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SUPREME COURT OF THE UNITED STATES

NO. _____

October Term, 1993

PRINCE GEORGE'S COUNTY, MARYLAND

PETITIONER,

v.

DONALD KIRSCH, et al.

RESPONDENTS

Petition for Writ of Certiorari
To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does Prince George's County Ordinance CB-152-1989, which places more stringent zoning restrictions on private "mini dormitory" properties leased to college students than on similar properties leased to non-students violate the Equal Protection Clause of the Fourteenth Amendment?

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JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). The judgment of the Court of Appeals of Maryland for which petitioner seeks review was entered on June 25, 1993 and is reported at 331 Md. 89, 626 A.2d 372 (1993).

SUPREME COURT OF THE UNITED STATES

No. _____

October Term, 1993

PRINCE GEORGE'S COUNTY, MARYLAND

PETITIONER,

v.

DONALD KIRSCH, et al.

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

Petitioner, Prince George's County, Maryland, requests that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of Maryland entered in the above entitled proceeding on June 25, 1993 reported at 331 Md. 89 (1993) and set forth at pages 1 through 57 of this Appendix to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case concerns a facial challenge to the constitutionality of Prince George's County Ordinance CB-152-1989 entitled, "Zoning Bill -- An Ordinance concerning mini dormitories". This zoning ordinance establishes certain criteria for residential property occupied by college students and fitting the statutory description of a "mini dormitory." The ordinance was enacted by the Prince George's County Council. Prince George's is a chartered home rule county. The County Council, an elected body, is the legislative branch of the county government. The Council derives its legislative power from Article XI-A of the Constitution of

Maryland.[1]

The ordinance in question defines a "mini dormitory" as:

> An off-campus residence located in a building that is, or was originally constructed as a one family, two-family, or three-family dwelling which houses at least three (3) but not more than five (5)individuals all or part of whom are unrelated to one another by blood, adoption or marriage and who are registered as full-time or part-time students at an institution of higher learning.

Code of Prince George's County, Maryland § 27-107.1(a)(150.1)

In order to comply with the ordinance, these "mini-dormitories" must meet minimum standards regarding interior living space, exterior appearance and parking facilities.

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1. More specifically, the Council derives its zoning power from the Regional District Act, Maryland Code (1957, 1986 Relp. Vol.) Art. 28, Sec. 8-101.

The ordinance was enacted in response to growing concern among the residents of the communities surrounding the University of Maryland, an expanding university with over 30,000 students.[2] These residents were troubled by the increase in congestion, litter and noise caused by the escalation in the number of student "group houses" in their neighborhoods. Accordingly, the stated purpose of the ordinance is to, "[p]revent or control the detrimental effects upon neighboring properties, such as illegal parking and saturation of available parking by residents of

2. According to the University of Maryland's Office of Institutional Studies there were 21,799 undergraduate and 8,521 graduate students enrolled at the main College Park campus in the spring semester of 1993.

mini dormitories, litter and noise." § 27-249.1(b).

Since this case involves a facial challenge, the facts are few and undisputed. The Prince George's County Council, acting in their zoning capacity, enacted the ordinance on November 28, 1989. Donald Kirsch and Martha Kaye Dunn, owners of rental property affected by the ordinance, and Stephanie Stockman and Daniel Cones, would-be student lessees of this property filed a motion for interlocutory judgment in the Prince George's County Circuit Court on February 14, 1991. In their motion, the Plaintiffs sought to enjoin the County from enforcing the ordinance. As grounds they alleged, inter alia, that the ordinance violated their Fourteenth

Amendment right to equal protection of the law. The motion was granted and cross motions for summary judgment ensued. After an exhaustive analysis of the ordinance and the applicable constitutional standards, the circuit court held that the ordinance did not offend equal protection principles and granted summary judgment in favor of the county.

The students and property owners took their appeal of right to the Court of Special Appeals of Maryland. Employing the rational basis review prescribed by the United States Supreme Court for the review of social and economic regulation, the intermediate appellate court affirmed the trial court ruling. Upon petition of the property owners and students, the Court of

Appeals of Maryland granted certioari and reversed the lower court rulings.

The court of appeals began its equal protection analysis by noting that the Maryland constitution contains no express equal protection clause,[3] and stating:

> We have generally relied on opinions of the United States Supreme Court for interpretation of "those portions of the Maryland Constitution and Declaration of Rights which afford protection to its citizens against unreasonable or arbitrary discrimination in like manner and to the same extent as the Fourteenth Amendment of the Federal Constitution.

Kirsch v. Prince George's County, 331 Md. 89, 97, 626 A.2d at 376 (1993).

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3. The court also states that the Fourteenth Amendment of the United States Constitution and Article 24 of the Maryland Declaration of Rights "are independent of one another, and a violation of one is not necessarily a

3. (con't.) violation of the other." 331 Md. at 97, 626 A.2d at 376. However, the cases cited for this proposition state that the two provisions are "in pari materia" Atty. General of Md. v. Waldron, 289 Md. 683, 426 A.2d 929, 946 (1981), and that "the two are so intertwined that they, in essence, form a double helix." Id., 426 A.2d at 941.

In Michigan v. Long, 463 U.S. 1032 (1983), the Court stated that "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide, separate, adequate and independent grounds, we, of course, will not undertake to review the decision. Id., 463 U.S. at 1041. However, when "a state court decision fairly appears to rest primarily on federal law or to be interwoven with the federal law . . . we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." Id. at 1040-41.

It is, therefore, clear that Article 24 of Maryland's Declaration of Rights does not provide an independent and adequate state ground for the court's decision in this case, and any assertions to the contrary by the court or the respondents are unsupported.

Applying Supreme Court precedents, the court of appeals found that the ordinance did not implicate any fundamental rights or suspect classes, and that "[t]he petitioners do not argue otherwise. Therefore, we must apply the rational basis standard." 331 Md. at 104, 626 A.2d at 379.

The Court acknowledged that "clearing residential neighborhoods of noise, litter and parking congestion" Id. at 106, 626 A.2d at 380, is a legitimate legislative objective. The court, however, found that classifying college students differently than other occupants of group houses was "wholly unrelated to the stated purpose of the ordinance." Id. at 108, 626 A.2d at 381. The court found that non-students "would equally add motor vehicles to a

congested parking situation and pose the threat of increased noise and litter." Id. at 107, 626 A.2d at 381. As such, the court held that the ordinance represents "that sort of arbitrary classification forbidden by our constitutions." Id. at 106, 626 A.2d at 380.

The dissent in this 4-3 decision began their analysis by stating that, "[t]he Court seems to be either subtly altering the rational basis test, or paying lip service to that test but refusing to apply it in the instant case. Id. at 108, 626 A.2d at 381. Using rationality review, the dissent concluded that "several states of facts reasonably can be conceived that would sustain the classification." Id. at 110, 626 A.2d at 382.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. THE DECISION OF THE COURT OF APPEALS OF MARYLAND DECLARING PRINCE GEORGE'S COUNTY ORDINANCE CB-152-1989 IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IS IN DIRECT CONFLICT WITH PRINCIPLES ENUNCIATED BY THIS COURT IN CITY OF CLEBURNE v. CLEBURNE LIVING CENTER, 473 U.S. 432 (1985) AND VILLAGE OF BELLE TERRE v. BORAAS, 416 U.S. 1, (1974).

The Court of Appeals of Maryland erred in the following ways: a) the court misconstrued the relevant Supreme Court precedents; b) the court relied on Supreme Court precedents that are not in point with the instant case, and; 3) the court misapplied the rational basis test.

It is the position of the petitioner that the ordinance at issue is a valid exercise of the county's police power, and that the ordinance comports with this Court's

interpretations of the Equal Protection Clause.

A. The Court of Appeals of Maryland misconstrued this Court's decisions in Cleburne and Boraas.

This Court has established a framework for review of social and economic regulation that gives great deference to the legislative branch of government. This deference is based on both constitutional separation of powers considerations, and on the common sense acknowledgement that courts are ill suited to engage in the balancing of complex social and economic forces. See, F.C.C. v. Beach Communications, Inc., No. 92-603 slip op. at 5-6 (U.S. Jun. 1, (1993).

In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) this Court was asked to review a city ordinance

very similar to the ordinance at issue in the instant case. The Village of Belle Terre is located in close proximity to a branch campus of the State University of New York. In order to protect its residential and family character, the town restricted land use to single family dwellings and expressly excluded boarding houses, fraternity houses, or multiple dwelling houses. 416 U.S. at 2. Several college students challenged the town's ordinance alleging, inter alia, that the ordinance denied them equal protection of the law. Id. at 7. The Court found that the students had no fundamental rights at issue, and stated, "[w]e deal with economic and social legislation where legislatures have historically drawn lines which we respect against the

charge of violation of the equal protection clause. If the law be 'reasonable, not arbitrary' and bears 'a rational relationship to a permissible state objective.'" Id. at 8 (citations omitted)

Acknowledging the validity of the town's objective, the Court held that:

> [B]oarding houses, fraternity houses and the like present urban problems. More people occupy given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds. A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guide lines in a land-use project addressed to family needs.

Id. at 9.

Despite the deference accorded economic legislation, this Court has upheld the guarantee of equal protection

by striking down arbitrary or irrational laws.

In City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), the Court invalidated a zoning ordinance after finding it bore no relation to any legitimate interest of the city. The ordinance at issue in Cleburne required a property owner to secure a special use permit for the operation of a group home for retarded persons. No such special use permit was required for apartment houses, fraternity houses, hospitals, sanitariums, or any other use. Id. at 447. The Court found that retarded persons did not constitute a "quasi-suspect" class. Id. at 446. Moreover, the Court strongly affirmed the legislature's right to classify groups, stating:

> [W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the state has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requries only a rational - means to serve a legitimate end.

Id. at 441-442.

The ordinance in Cleburne was invalidated not because it singled out retarded persons, but because the record showed no evidence that the use of the property as a home for retarded persons "would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and

hospitals would not." Id. at 448.

In sum, the Court found that the basis for the ordinance "appears to us to rest on an irrational prejudice against the mentally retarded." Id. at 450.

The ordinance at issue in the instant case was not born of any "irrational prejudice" against college students, but out of the simple reality that college students tend to create the type of disturbances that prevent a neighborhood from being a "sanctuary". Boraas, 416 U.S. at 8-9.

In the instant case the court of appeals interpreted Boraas too narrowly. As noted above, the zoning ordinance at issue in Boraas was almost identical to the county ordinance in question here, and the same equal protection arguments

were made by the college students in both cases. Maryland's high court did not, however, follow Boraas but instead attempted to distinguish that decision. The court found that the ordinance at issue in Boraas restricted land use to single-family dwellings and excluded all other uses. The court then stated:

> Unlike the zoning ordinance analyzed in Boraas, the Prince George's County "mini dorm" ordinance does not differentiate based on the nature of the use of the property, such as a fraternity house or a lodging house but rather on the occupation of the person who would dwell therein.

331 Md. at 107, 626 A.2d at 381.

The court seems to hold that if the ordinance had placed restrictions on all group houses, and not just on student "mini-dorms", the ordinance would have been constitutional under Boraas, but

since it did not, it was unconstitutionally underinclusive. The Boraas decision does not, however, apply only to ordinances that broadly distinguish between "family" and "non-family" uses. On the contrary, Boraas validates all rationally based zoning laws that promote the preservation of family oriented neighborhoods without using invidious discrimination. Furthermore, even if the county's ordinance is underinclusive, it is still constitutional under the principles enunciated in Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, where the Court stated that:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same fields may be of different dimensions and proportions, requiring

> different remedies or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may elect one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

Id. at 489. (citations omitted).

When viewed in light of Williamson, the Boraas decision clearly sanctions the type of legislative "line drawing" that the County Council engaged in in the instant case.

The court of appeals also misconstrued the Cleburne decision, alleging it to be an example of the Supreme Court's recent willingness to invalidate legislative classifications that do not further the express statutory purposes. 331 Md. 89, 98-99, 626 A.2d at 376. Cleburne, however, does not shift the constitutional burden to the legislature to show that a given statutory classification is proper. The Cleburne opinion simply held that where the record contains no legitimate basis for the classification, but does show the existence of "irrational prejudice", then the law is invalid. 473 U.S. at 450.

Unlike in Cleburne, the record in this case contained ample evidence of how the "mini-dorms" occupied by college

students would "threaten legitimate interests of the city in a way that other permitted uses . . . would not." 461 U.S. at 448. The dissent in this 4-3 decision had no difficulty finding rational justifications for the statutory classification, stating:

> We can conceive that as full or part-time students, they may only have limited funds and are therefore, more willing to tolerate crowded and inferior living quarters. Real estate speculators, ceasing upon this market, may buy small, in expensive single-family residences close to these institutions of higher learning and rent formerly single family homes to several students per house. Many of these students have cars which they might park on the street. As only nine-ten months tenants, the students may not be concerned with maintaining the property. Intolerant neighbors inconvenienced by the shortage of parking spaces and concerned about the

declining aesthetics of their neighborhoods may put their homes up for sale. . . . soon there may be a real danger that many quiet college residential neighborhoods will be saturated with student mini-dorms. These assumed justifications are not irrational or arbitrary.

It is also easy to conceive that there is no such problem with non-students or people with other occupations. These non-students are more likely to be employed full-time than are students. And with more money to spend on housing, they presumably may be less likely to tolerate crowded inferior living conditions. Also, since they will live in the same residence all year long, rather than only for nine months of the year, the premises are less likely to be neglected. Non-student group residences are more likely to be dispersed throughout the county and not clustered around the two universities. These hypotheses are conceivable and should not be dismissed as irrational.

331 Md. at 110-111, 626 A.2d at 382-383.

Based on these many rational justifications for the county ordinance, the court of appeals should have upheld the statute under Boraas, and distinguished the facts of this case from those in Cleburne.

B. The Court of Appeals of Maryland relied on Supreme Court precedents that are not in point with the instant case.

Instead of following this Court's decisions in Boraas and Cleburne, the Court of Appeals of Maryland appeared to place primary reliance on another line of Supreme Court precedents.

In this line of recent cases, the Supreme Court seemed to make a more rigorous inquiry into the legitimacy of the governmental purpose behind the

statute at issue. Zobel v. Williams, 457, U.S. 55 (1982) involved a statutory scheme by which Alaska distributed funds from budget surpluses to state residents based on their length of state residency. The Court held this statute violative of the Equal Protection Clause because of its potential to create "fixed permanent distinctions between . . . classes of concededly bona fide residents." Id. at 59. The Court held that rewarding citizens for past contributions was not a legitimate state purpose. In Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985), the Court used a similar analysis to invalidate a New Mexico law that granted preferential tax treatment to Vietnam veterans who were residents of the state prior to the end of the war. That same term, in

Williams v. Vermont, 472 U.S. 14 (1985), the Court struck down a Vermont statute that imposed different registration tax rates on automobiles depending on whether the owner was a Vermont resident at the time of purchase. The Court found that the statutory purpose of raising revenues was legitimate, but held that charging Vermont residents different rates based on their residency at the time they purchased the car was an impermissible distinction, bearing "no relation to the statutory purpose." Id. at 24. Although the legislative purpose was valid in Williams, this case can still be placed in line with Zobel and Hooper because the inherent evil was the creation of different classes of state residents based on duration of residency.

Unlike the laws invalidated in these cases, the county's "mini-dorm" ordinance does not create any "permanent classes" of state citizens. The "class" of college students affected by this ordinance are only affected during the time they enjoy the many benefits of their student status. In fact, the "mini-dorm" ordinance benefits these college students by protecting them from over-crowded housing and inadequate parking conditions. Most importantly, the ordinances in Zobel, Hooper, and Williams all either rewarded or penalized classes of persons based on their length of state residency. The "mini-dorm" ordinance makes no such unconstitutional classifications. As such, the court of appeals' reliance on this line of cases was misguided.

C. The Court of Appeals of Maryland misapplied the rational basis test.

In Ferguson v. Skrupa, 372 U.S. 726 (1963) Justice Black stated that "[w]e have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Id. at 730. The dissent in the instant case rebuked the majority for failing to heed that constitutional tenet. 331 Md. at 112-113, 626 A.2d at 384. The Fourth Circuit recently held that "a court must make every feasible attempt to discern the reasons for a legislative distinction before it declares that distinction irrational and unconstitutional." Faircloth v. Finesod, 938 F.2d 513, 517 (4th Cir. 1991)

(emphasis in original).

In this case, the slim majority of the Court of Appeals of Maryland made no effort to note the many legitimate reasons for the "mini-dorm" ordinance. In striking down the restrictions placed on "mini-dorm" properties occupied by students, the court summarily found that non-student residents of group houses "would equally add motor vehicles to a congested parking situation and pose the threat of increased noise and litter." 331 Md. at 107, 626 A.2d at 381. In reaching this conclusion, the court made no reference to the record and gave no basis whatsoever for this finding. Looking at the same record, the dissenting judges found a myriad of reasons for the legislative distinction between students and non-students, and

in so doing, correctly applied the rational basis standard. By failing to accord the ordinance the proper level of deference, the majority substituted its judgment for that of the County Council. In doing so, the Court of Appeals of Maryland has directly contravened the binding precedents of this Court and the Fourth Circuit. The petitioner, therefore, respectfully asks this Court to grant this petition for a writ of certiorari in order to rectify this serious and irreconcilable conflict.

II. THE DECISION OF THE COURT OF APPEALS OF MARYLAND HOLDING PRINCE GEORGE'S COUNTY ORDINANCE CB-152-1989 VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT RAISES A SERIOUS QUESTION OF NATIONAL IMPORTANCE REGARDING THE AUTHORITY OF STATES AND THEIR SUBDIVISIONS TO EFFECTIVELY MANAGE POPULATION GROWTH THROUGH VALID ZONING LAWS.

Prince George's County is a demographically diverse county in the Washington, D.C. metropolitan area, with approximately 750,000 residents. As a chartered "home rule" county it enjoys, and requires, a great deal of autonomy from the state of Maryland. The people of Prince George's County speak through an elected body called the County Council. Pursuant to the doctrine of separation of powers, legislation enacted by the Council is supposed to be accorded great deference by the judicial branch. F.C.C. v. Beach Communications,

Inc., No. 92-603, slip op. at 5-9, (U.S. Jun. 1, 1993) In the instant case, the Court of Appeals of Maryland impermissibly violated that doctrine by substituting its judgment for the judgment of the County Council.

In Beach Communications the Court stated that

> equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable basis for the classification.

Id. at 5-6.

As noted above, the Fourth Circuit has held that in reviewing social and economic legislation, a court "must make

every feasible attempt to discern the reasons for a legislative distinction before it declares that distinction irrational and unconstitutional." Faircloth v. Finesod, 938 F.2d 513, 517 (4th Cir. 1991) (emphasis in original).

The Court of Appeals of Maryland failed to heed either of these well established tenets in the instant case. In so doing they have rendered the County Council impotent and unable to effectively legislate for their constituency. Of even greater significance is the prospective effect that this decision will have on Maryland's state and county legislatures.

This decision, which directly conflicts with long standing Supreme Court precedents, will have several

potentially dire effects. First, it will impede Maryland's state and county legislatures in their attempts to address the myriad of modern day issues that require the sort of "line drawing" that Maryland's highest court struck down in this case. Second, it imposes a binding and far reaching precedent on Maryland's lower courts that directly conflicts with the decisions of this Court. Third, it may burden Maryland's courts by encouraging a host of equal protection challenges which would not be brought, but for this improvident decision. Finally, this decision may be cited as persuasive authority in other states and may thereby foster further misapplication of this Court's equal protection decisions.

CONCLUSION

For these reasons, the petitioner respectfully asks this Court to grant this petition for a writ of certiorari in order to reaffirm its equal protection jurisprudence and to restore to the legislative branches of Maryland their proper lawmaking power and discretion.

IN THE COURT OF APPEALS OF MARYLAND

No. 111

September Term, 1992

DONALD KIRSCH, et al.

v.

PRINCE GEORGE'S COUNTY, MARYLAND

Murphy, C.J.
Eldridge
Rodowsky
McAuliffe
Chasanow
Karwacki
Bell,

JJ.

Opinion by Karwacki, J.
Murphy, C. J., Rodowsky,
Chasanow, JJ., dissent.

Filed: June 25, 1993

APX001

In this case, we are asked whether the Prince George's County "mini-dorm" zoning ordinance codified within Subtitle 27 of the Prince George's County Code (1991), regulating the rental of residential property to three or more students pursuing higher education, deprives such students of equal protection of the law by discriminating against a class of persons in violation of the Fourteenth Amendment of the United States Constitution and Article 24 of the Maryland Declaration of Rights.

I.

Prince George's County derives its zoning authority from the Regional District Act, Maryland Code (1957, 1986 Repl. Vol.), Art. 28, § 8-101. That section designates the county councils

of Montgomery and Prince George's Counties "as the district council for that portion of the regional district lying within each county, respectively." § 8-101(a). The section further provides:

> "(b) Grant of zoning power. -- (1) Each district council, respectively, in accordance with the conditions and procedures specified in this article, may by ordinance adopt and amend the text of the zoning ordinance and may by resolution or ordinance adopt and amend the map or maps accompanying the zoning ordinance text to regulate, in the portion of the regional district lying within its county, (i) the location, heights, bulk, and size of buildings, other structures, and units therein, building lines, minimum frontages, depths and areas of lots, and percentages of lots which may be occupied; (ii) the size of lots, yards, courts, and other open spaces; (iii) the erection of temporary stands and structures; (iv) the density and distribution of

> population; (v) the location and uses of buildings and structures and units therein for trade, industry, residence, recreation, agriculture, public activities, and other purposes; and (vi) the uses of land, including surface, subsurface, and air rights therein, for building, trade, industry, residence, recreation, agriculture, forestry, or other purposes."

The Prince George's County "mini-dorm" ordinance was introduced in the County Council of Prince George's County, sitting as the District Council, as Zoning Ordinance Bill Number CB-152-1989 on October 31, 1989, was enacted into law on November 28, 1989, and took effect on July 1, 1990. The ordinance's preamble states:

> "AN ORDINANCE concerning
>
> Mini-Dormitories
>
> FOR the purpose of defining a mini-dormitory; establishing

> criteria for regulating this use; allowing it as a permitted use or by Special Exception in certain zones, subject to certain criteria; prohibiting the Board of Appeals from granting certain variances for mini-dormitories; prohibiting the Planning Board from approving departures from the required number of parking spaces for mini-dormitories; and requiring all existing uses to be in conformance with these regulations by July 1, 1991."

These legislative goals were achieved by amending the County's zoning ordinance at §§ 27-107.1, 27-229(b), 27-441(b)(6), 27-515(b)(7), 27-547(b)(7), 27-568 and 27-588(c) and adding §§ 27-249.1, 27-374.1, 27-445.7, 27-532.2, and 27-548.1.2.

The ordinance defines a "mini-dormitory" as:

> "An off-campus residence, located in a building that is, or was originally constructed as a one-family, two-family,

> or three-family dwelling which houses at least three (3), but not more than five (5), individuals, all or part of whom are unrelated to one another by blood, adoption or marriage and who are registered full-time or part-time students at an institution of higher learning."

§ 27-107.1 (a) (150.1) (emphasis added). Mini-dormitories are permitted uses in all of the "specific residential zones" in the County, except for R-10A Zone (Multifamily High Density Residential-Efficiency); in all of the "comprehensive design zones" except for the "Employment and Institutional Area"; and in the "mixed use zones," provided the facilities satisfy certain requirements:

> "(1) The property shall be maintained in accordance with all applicable provisions of the County Code;
> (2) Rooms used for

sleeping purposes shall have not less than seventy (70) square feet per resident;

(3) All parking spaces shall be provided on-site [at the ratio of one space for each resident].

(4) Parking spaces provided solely for, and on the same lot with the mini-dormitory may be located behind the other (the front space may be used as access to the rear space);

(5) The number of driveway entrances authorized shall not exceed one (1) driveway entrance per lot or per street on which the subject lot has frontage (i.e., a corner lot), unless such driveway entrances were in existence on November 28, 1989;

(6) The use shall not alter the single-family residential character or appearance of the premises;

(7) The maximum percentage of lot coverage for a mini-dormitory shall be the same as that for the dwelling type that was originally constructed on the lot; and

(8) The maximum percentage of lot coverage may only be increased by the District Council in the form of a variance granted in

connection with the approval of a Special Exception."

The ordinance specifically prohibits the Board of Zoning Appeals from granting a variance to the requirements. § 27-29(b)(26). Further, departures from the required number of parking spaces may not be approved by the Planning Board and a reduction in the required number of spaces must have approval of the County Council, sitting as the District Council, "in the form of a variance granted in connection with the approval of a Special Exception." § 27-588(c)(2). A "mini-dormitory" is permitted only after obtaining a Use and Occupancy Permit certifying the residence as an acceptable "mini-dormitory" or by receiving special exception from the District Council.

The ordinance further provides that nonconforming structures being used as mini-dorms must be certified and "may only continue subject to the requirements of this Section and to any other applicable requirements of [the code]." § 27-249.1(a). In that section, the ordinance continues:

> "(b) The purpose of this Section is to prevent or control detrimental effects upon neighboring properties, such as illegal parking and saturation of available parking by residents of mini-dormitories, litter, and noise.
>
> (c) All certified nonconforming mini-dormitories shall meet the following requirements:
>
> (1) The use shall not alter the single-family residential character or appearance of the premises; and
>
> (2) The property shall be maintained in accordance with all applicable provisions of the County Code."

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The ordinance provides additional requirements for specific special exceptions at § 27-374.1:

> (a) A mini-dormitory may be permitted, subject to the following:
>
> (1) The application shall be accompanied by a statement which sets forth an acceptable maintenance plan;
>
> (2) The site plan shall include the number, type, and location of exterior trash receptacles;
>
> (3) Rooms used for sleeping purposes shall have not less than seventy (70) square feet per resident;
>
> (4) All required parking spaces shall be provided on-site, except as follows:
>
> (A) The required number of parking spaces may be reduced on-site by one (1) space if on-street parking is allowed in front of the subject lot; or
>
> (B) The required number of parking spaces may be provided off-site if:
>
> (i) The mini-dormitory is located within five hundred (500) feet of an existing parking lot;

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(ii) The owner of the mini-dormitory has written permission from the parking lot owner for the residents of the mini-dormitory to use the parking lot; and

(iii) The existing parking lot has sufficient surplus parking spaces available to provide the number of spaces required;

(5) Parking spaces provided solely for, and on the same lot with, the mini-dormitory may be located one behind the other (the front space may be used as access to the rear space);

(6) The number of driveway entrances authorized shall not exceed one (1) driveway entrance per building lot or per street on which the subject lot has frontage (i.e., a corner lot) unless such driveway entrances were in existence on November 28, 1989;

(7) The use shall not alter the single-family residential character or appearance of the premises;

(8) The maximum percentage of lot coverage for a mini-dormitory shall be the same as that for the dwelling type that was originally constructed on the lot; and

(9) The maximum percentage of lot coverage may only be increased by the District Council in the form of a variance granted in connection with the approval of a Special Exception."

On July 3, 1990, Donald P. Kirsch and Martha Kaye Dunn, individual owners of residential property they wish to rent to persons including students, and Stephanie Stockman and Daniel Cones, both students at the University of Maryland residing off campus in housing subject to the ordinance, ("the petitioners"), filed suit in the Circuit Court for Prince George's County, seeking declaratory relief from the ordinance. On motion of the plaintiffs, the circuit court issued an interlocutory injunction on February 14, 1991, enjoining the County from enforcing the ordinance pending final

disposition. Cross-motions for summary judgment were filed, and on August 1, 1991, the circuit court granted the County's motion. That judgment was affirmed by Court of Special Appeals. Kirsh v. Prince George's County, 92 Md. App. 719, 610 A.2d 343 (1992). We granted the plaintiffs' petition for a writ of certiorari and shall reverse the judgment of the intermediate appellate court.

II.

A.

Section I of the Fourteenth Amendment of the United States Constitution provides in part:

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Article 24 of the Declaration of Rights

provides:

> "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."

Although the Maryland Constitution does not contain an express equal protection clause, we have long held that equal protection is implicitly guaranteed by the due process provision found in Article 24 of the Declaration of Rights. See Murphy v. Edmonds, 325 Md. 342, 353, 601 A.2d 102, 107 (1992); Hargrove v. Board of Trustees, 310 Md. 406, 416, 529 A.2d 1372, 1377 (1987), cert. denied, 484 U.S. 1027, 108 S. Ct. 753, 98 L. Ed. 2d 766 (1988); United Wire v. State Deposit Ins. Fund, 307 Md.

148, 157, 512 A.2d 1047, 1052 (1986); Enis v. State, 306 Md. 579, 591, 510 A.2d 573, 579 (1986); State v. Wyand, 304 Md. 721, 726, 501 A.2d 43, 46 (1985); cert. denied, 475 U.S. 1095, 106 S. Ct. 1492, 89 L. Ed. 2d 893 (1986); Loveday v. State, 296 Md. 226, 241, 462 A.2d 58, 65 (1983); Hornbeck v. Somerset Co. Bd. of Educ., 295 Md. 597, 640, 458 A.2d 758, 768, 780-81 (1983); Lawrence v. State, 295 Md. 557, 559-60, 457 A.2d 1127, 1128 (1983); Attorney General v. Waldron, 289 Md. 683, 704-05, 426 A.2d 929, 940-41 (1981); Board of Supervisors of Elections v. Goodsell, 284 Md. 279, 293 n.7, 396 A.2d 1033, 1044, n.7 (1978); Governor v. Exxon Corp., 279 Md. 410, 438 n.8, 370 A.2d 1002, 1118 n.8 (1977), aff'd 437 U.S. 117, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978); Bruce v.

Director, Chesapeake Bay Affairs, 261 Md. 585, 600, 276 A.2d 200, 208 (1971).

We have generally relief on opinions of the United States Supreme Court for interpretation of:

> "Those portions of the Maryland Constitution and Declaration of Rights [which] afford protection to its citizens against unreasonable or arbitrary discrimination in like manner and to the same extent as the Fourteenth Amendment of the Federal Constitution."

United States Mortgage Company v. Matthews, 167 Md. 383, 395, 173 A. 903, 909, rev'd on other grounds, 293 U.S. 232, 55 S. Ct. 168, 79 L.Ed. 299 (1934). See also Murphy, supra, at 354, 601 A.2d at 108; Hornbeck, supra, at 640, 458 A.2d at 780-81; Waldron, supra, at 704, 426 A.2d at 940-41;; Pitsenberger v. Pitsenberger, 287 Md. 20, 27, 410

A.2d 1052, 1056 (1980); Bureau of Mines v. George's Creed Coal and Land Co., 272 Md. 143, 156, 321 A.2d 748, 755 (1974); Allied American Co. v. Comm'r, 219 Md. 607, 615-16, 150 A.2d 421, 426-27 (1959). Nevertheless, we have recognized that the two provisions are independent of one another, and a violation of one is not necessarily a violation of the other. See Hornbeck, supra, at 640, 458 A.2d at 781; Waldron, supra, at 704-05, 426 A.2d at 941.

In Murphy v. Edmonds, supra, we revisited the standards under which legislative classifications are judged in equal protection cases. Speaking for the Court, Judge Eldridge wrote:

> "In most instances when a governmental classification is attacked on equal protection grounds, the classification is reviewed under the so-called

'rational basis' test. Generally under that test, a court 'will not overturn' the classification 'unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [governmental] actions were irrational.' A statutory classification reviewed under the rational basis standard enjoys a strong presumption of constitutionality and will be invalidated only if the classification is clearly arbitrary.

"Where, however, a statutory classification burdens a 'suspect class' or impinges upon a 'fundamental right,' the classification is subject to strict scrutiny. Such statutes will be upheld under the equal protection guarantees only if it is shown that 'they are suitably tailored to serve a compelling state interest.'

"Finally, there are classifications which have been subjected to a higher degree of scrutiny than the traditional and deferential rational basis test, but which have not been deemed to involve suspect classes or

> fundamental rights and thus have not been subjected to the strict scrutiny test. Included among these have been classifications based on gender, discrimination against illegitimate children under some circumstances, a classification between children of legal residents and children of illegal aliens with regard to a free public-education, and a classification under which certain persons were denied the right to practice for compensation the profession which they were qualified and licensed."

Id. at 355-357, 601 A.2d at 108-09 (citations omitted).

In recent years, the Supreme Court has declined to extend heightened scrutiny review to additional legislative classifications. Instead, the Court has on several occasions held that notwithstanding the traditional deference accorded legislative acts certain legislative classifications

failed rational basis scrutiny because the classification adopted did not further the express purpose of the statute. In City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985), the Supreme Court invalidated a city ordinance requiring an annual special use permit for particular group homes, including homes occupied by mentally retarded citizens. The Court stated:

> "The lesson of [Massachusetts Board of Retirement v.] Murgia [427 U.S. 307 (1976)] is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very relunctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize

> legislative choices as to whether, how, and to what extent those interest should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end."

Id. at 441-42, 105 S. Ct. at 3255, 87 L. Ed. 2d at 321.

Nevertheless, Justice White, speaking for the Court, continued:

> "Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. The State may not

> rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives--such as 'a bare . . . desire to harm a politically unpopular group,'--are not legitimate state interests. Beyond that, the mentally retarded, like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law."

Id. at 446-47, 105 S. Ct. at 3257-58, 87 L. Ed. 2d at 324 (citations omitted).

Passing on the issue of the zoning ordinance's validity, Justice White opined:

> "The constitutional issue is clearly posed. The city does not require a special use permit in a R-3 zone for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the insane or feebleminded or alcoholics or drug addicts),

private clubs or fraternal orders, and other specified uses. It does, however, insist on a special permit for the Featherston home, and it does so, as the District court found, because it would be a facility for the mentally retarded. May the city require the permit for this facility when other care and multiple-dwelling facilities are freely permitted?

"It is true, as already pointed out, that the mentally retarded as a group are indeed different from others not sharing their misfortune, and in this respect they may be different from others who would occupy other facilities that would be permitted in an R-3 zone without a special permit. But this difference is largely irrelevant unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not. Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case."

Id. at 447-48, 105 S.Ct. at 3258, 87

L.Ed.2d at 325.

In Hooper v. Bernalillo County Assessor, 472 U.S. 612, 105 S.Ct. 2862, 86 L.Ed.2d 487 (1985), a qualified Vietnam veteran and his wife who established residency in New Mexico in 1981 applied for a tax exemption in 1983 under a New Mexico statute exempting from the State's property tax $2,000 of the assessed value of property of honorably discharged veterans who had served on active duty during the Vietnam War for at least 90 continuous days. The exemption was limited to those veterans who resided in New Mexico before May 8, 1976. The exemption was denied. The couple challenged the statute as denying them equal protection of the law. In applying the rational basis standard to strike down the statute, the Court noted

that "if the statutory scheme cannot pass even the minimum rationality test, our inquiry ends." Id. at 618, 105 S.Ct. at 2866, 86 L.Ed.2d at 493. The Court went on to hold:

> "Even assuming that the State may legitimately grant benefits on the basis of a coincidence between military service and past residence, the New Mexico statute's distinction between resident veterans is not rationally related to the State's asserted legislative goal. The statute is not written to require any connection between the veteran's prior residence and military service. Indeed, the veteran who resided in New Mexico as an infant long ago would immediately qualify for the exemption upon settling in the State at any time in the future regardless of where he resided before, during, or after military service."

Id. at 621-22, 105 S.Ct. at 2868, 86 L.Ed.2d at 493.

In Williams v. Vermont, 472 U.S. 14, 105 S.Ct. 2465, 86 L.Ed.2d 11 (1985), the Court invalidated an automobile registration tax scheme which exempted cars purchased in Vermont where a sales tax had been paid. The scheme also provided a credit against the registration tax for the value of a sale tax paid on a vehicle purchased in another state by persons residing in Vermont at the time of purchase where the foreign state reciprocated in like fashion for Vermont residents. The statute was challenged by persons who bought and registered cars outside of Vermont prior to becoming Vermont residents. In discussing the applicable standard of review, the Court stated that "[a]n exemption such as that challenged here 'will be sustained if

the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose.'" Id. at 22-3, 105 S.Ct. at 2471, 86 L.Ed.2d at 19 (citation omitted). In voiding the statute, the Court concluded:

> "In the present case, residence at the time of purchase is a wholly arbitrary basis on which to distinguish among present Vermont registrants--at least among those who used their cars elsewhere before coming to Vermont. Having registered a car in Vermont they are similarly situated for all relevant purposes. Each is a Vermont resident, using a car in Vermont, with an equal obligation to pay for the maintenance and improvement of Vermont's roads. The purposes of the statute would be identically served, and with an identical burden, by taxing each. The distinction between them bears no relation to the statutory purpose."

Id. at 23-24, 105 S.Ct. at 2472, 86 L.Ed.2d at 19-20.

In Metropolitan Life Ins.Co. v. Ward, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985), the Court struck down an Alabama statute that imposed a lower gross premiums tax on domestic insurance companies than charged to out-of-state insurance companies with a provision allowing the foreign firms to lower, but not eliminate, their tax liability by investing in Alabama assets and securities. The foreign insurers challenged the statute on equal protection grounds. The Court explained that:

> "In whatever light the State's position is cast, acceptance of its contention that promotion of domestic industry is always a legitimate state purpose under equal protection analysis would eviscerate the Equal Protection Clause in this context. A State's natural inclination frequently would

> be to prefer domestic business over foreign. If we accept the State's view here, then any discriminatory tax would be valid if the State could show it reasonably was intended to benefit domestic business. A discriminatory tax would stand or fall depending primarily on how a State framed its purpose--as benefitting one group or as harming another. This is is a distinction without a difference, and one that we rejected last Term in an analogous context arising under the Commerce Clause. Bacchus Imports, Ltd v. Dias, 468 U.S., at 273. See n. 6, supra. We hold that under the circumstances of this case, promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose."

470 U.S. at 882, 105 S.Ct. at 1683, 87 L.Ed.2d at 762.

In Zobel v. Williams, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982), appellants, residents of Alaska since 1978, challenged Alaska's dividend

distribution scheme for income from the Permanent Fund, a fund into which the State was required to deposit a minimum of 25 percent of its annual mineral income. Under the distribution scheme, each adult resident received one dividend unit for each year of residency subsequent to 1959 when Alaska achieved statehood. A couple who had resided in Alaska for two years challenged the statute on the grounds that the dividend distribution plan violated federal equal protection guarantees by creating "preference given to persons who were residents when Alaska became a State in 1959 over all those who have arrived since then, as well as the distinctions made between all bona fide residents who settled in Alaska at different times during the 1959 to 1980 period." Id. at

59, 102 S.Ct. at 2312, 72 L.Ed.2d at 677. In applying rational basis to invalidate the statute, the Court reasoned:

> "When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Generally, a law will survive that scrutiny if the distinction it makes rationally furthers a legitimate state purpose. Some particularly invidious distinctions are subject to more rigorous scrutiny. Appellants claim that the distinctions made by the Alaska law should be subjected to the higher level of scrutiny applied to the durational residency requirements in Shapiro v. Thompson, [394 U.S. 618 (1969)] and Memorial Hospital v. Maricopa County, [415 U.S. 250 (1974)]. The State, on the other hand, asserts that the law need only meet the minimum rationality test. In any event, if the statutory scheme cannot pass even the minimal test by the State, we

> need not decide whether any enhanced scrutiny is called for."

Id. at 60-1, 102 S.Ct. at 2313-14, 72 L.Ed.2d at 677-78.

The court concluded that the State's objectives of creating a financial incentive for individuals to establish and maintain residency in Alaska and encouraging prudent management of the Permanent Fund were "not rationally related to the distinctions Alaska seeks to make between newer residents and those who have been in the State since 1959." Id. at 61, 102 S.Ct. at 2313, 72 L.Ed.2d at 678. The Court further found no legitimate state purpose in the State's third objective to reward citizens for past contributions, concluding that:

> "Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible."

Id. at 64, 102 S.Ct. at 2315, 72 L.Ed.2d at 680.

B

No fundamental right or suspect class has been infringed upon by the "mini-dorm" ordinance's classification of housing on the basis of the occupation of the tenants. The petitioners do not argue otherwise. Therefore, we must apply the rational basis standard. To withstand such equal protection scrutiny, the zoning ordinance in question, classifying rental property on the basis of the occupations pursued by the lessees away

from their residence, must be rationally related to a legitimate governmental purpose.

We have applied the rational basis standard when invalidating classifications in statutes regulating the pursuit of occupations where those classifications lacked a rational relation to a legitimate governmental purpose. Wheeler v. State, 281 Md. 593, 606, 380 A.2d 1052, 1060 (1977) (criminal statute which prohibited some employees of companies from selling distributing, publishing and printing obscene matter while allowing employees of motion picture theaters to do so was arbitrary in that the classification of persons subject to punishment bore no relation to the legislative purpose of prohibiting the distribution of obscene

materials); Maryland State Bd. of Barber Examiners v. Kuhn, 270 Md. 496, 312 A.2d 216 (1973) (statutory scheme permitting barbers to cut hair of men and women, but restricting cosmetologists to cutting hair of women does not "bear a real and substantial relation to the object sought to be obtained); Bruce v. Director, Chesapeake Bay Aff., supra (statutes limiting harvesting of crabs and oysters to county of residence represents an unreasonable legislative classification); Schneider v. Duer, 170 Md. 326, 184 A. 914 (1936) (statute regulating barbering license which provided for divisions of barbers into classes, some of whom are subjected to the terms of the act and other exempted, and which provided overly burdensome

licensing requirements, created unfair and unreasonable restraints); Dasch v. Jackson, 170 Md. 251, 183 A. 534 (1936) (public general law licensing and regulating only paper hangers who worked in Baltimore City but not affecting those who labored in other parts of the state struck down under an equal protection analysis); Havre de Grace v. Johnson, 143 Md. 601, 123 A. 65 (1923) (city ordinance prohibiting non-residents from operating taxi business clearly unreasonable).

III.

The stated purpose of the Prince George's county "mini-dorm" ordinance is to "prevent or control detrimental effects upon neighboring properties, such as illegal parking and saturation of available parking by residents of

mini-dormitories, litter, and noise." §27-249.1(b). In order to qualify as a resident of a mini-dormitory one must be a student enrolled full or part time in an institution of higher learning. At argument, the County Attorney conceded that the ordinance was passed to address complaints regarding noise, litter, and parking problems from residents of the College Park area, the site of the principal campus of the University of Maryland, an internationally recognized university community that is expanding in the number of students and scope of degree offerings on an annual basis. Notwithstanding the county-wide effect of the ordinance, the County failed to identify any other neighborhoods in the County where similar off-campus student housing created noise, litter or parking

problems.

The crucial question for this Court is whether the County by adopting the ordinance's classification advances its objective of clearing residential neighborhoods of noise, litter, and parking congestion within the command of the Equal Protection Clause of the Fourteenth Amendment and Article 24 of the Declaration of Rights. We hold that it does not. To differentiate between permissible residential tenant classes by creating more strenuous zoning requirements for some and less for others based solely on the occupation which the tenant pursues away from that residence is that sort of arbitrary classification forbidden under our constitutions.

The County has placed strong reliance on the Supreme Court's holding in Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974) arguing that as in Boraas, "the ordinance affects only unrelated individuals and does not impermissibly infringe upon the associational rights of the students." In Boraas, the Court was passing on a local zoning ordinance restricting land use to single family dwellings "excluding lodging houses, boarding houses, fraternity houses, or multiple-family dwelling houses." Id. at 2, 94 S.Ct. at 1537, 39 L.Ed. 2d at 800. "Family" was defined as:

> "One or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not

> exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."

Id. at 2, 94 S.Ct. at 1537-38, 39 L.Ed.2d at 800. The Supreme Court upheld the statute challenged by a landlord and six students from the nearby State University who rented a house in the village. The Court opined:

> "It is said, however, that the Belle Terre ordinance reeks with an animosity to unmarried couples who live together. There is no evidence to support it; and the provision of the ordinance bringing within the definition of a 'family' two unmarried people belies the charge.
>
> "The ordinance places no ban on other forms of association, for a 'family' may, so far as the ordinance is concerned, entertain whomever it likes.
>
> "The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a

> given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.
>
> "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within Berman v. Parker, supra. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

Id. at 8-9, 94 S.Ct. at 1541, 39 L.Ed.2d at 803-04.

Unlike the zoning ordinance analyzed in Boraas, the Prince George's County "mini-dorm" ordinance does not differentiate based on the nature of the use of the property, such as a fraternity house or a lodging house, but rather on the occupation of the persons

who would dwell therein. Therefore, under the ordinance a landlord of a building originally constructed as a one, two or three family dwelling is permitted to rent the same for occupancy by three to five unrelated persons so long as they are not pursuing a higher education without incurring the burdens of complying with the arduous requirements of the ordinance. Such occupancy would equally add motor vehicles to a congested parking situation and pose the threat of increased noise and litter. Such a zoning classification of residential property is wholly unrelated to the stated purpose of the ordinance, and its impact upon persons who are registered as full-time or part-time students at an institution of higher learning denies

those students equal protection of the laws under the Fourteenth Amendment to the United States Constitution and Article 24 of the Declaration of Rights.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED; CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO REMAND THE CASE TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR THE ENTRY OF A JUDGMENT DECLARING ZONING ORDINANCE BILL NUMBER CB-152-1989 INVALID; COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY PRINCE GEORGE'S COUNTY.

I respectfully dissent. The Court seems to be either subtly altering the rational basis test, or paying lip service to that test but refusing to apply it in the instant case. The test as set out in Murphy v. Edmonds is:

> Generally under [the rational basis] test, a court "'will not overturn'" the classification "'unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [governmental] actions were irrational."

325 Md. 342, 355, 601 A.2d 102, 108 (1992) (quoting Gregory v. Ashcroft, _____ U.S. ____, ____, 111 S.Ct. 2395, 2406, 115 L.Ed.2d 410, 430 (1991), in turn quoting, Vance v. Bradley, 440 U.S. 93, 97, 99 S.Ct. 939, 943, 59 L.Ed.2d 171, 176 (1979)). Further,

> [a] statutory classification reviewed under the rational basis

> standard enjoys a strong presumption of constitutionality and will be invalidated only if the classification is clearly arbitrary. (Citations omitted).

Id. at 356, 601 A.2d at 108.

In the instant case, the Court restates the rational basis test with a far different spin. "To withstand such equal protection scrutiny, the zoning ordinance in question...must be rationally related to a legitimate governmental purpose." _____ Md. ____, ____, ____ A.2d ____, ____ (1993) (Majority Op. at 16). The strong presumption of constitutionality seems to have been ignored both in the restated rational basis test and in its application in the instant case.

The majority holds:

> To differentiate between permissible residential tenant classes by creating more strenuous

> zoning requirements for some and less for others based solely on the occupation which the tenant pursues away from that residence is that sort of arbitrary classification forbidden under our constitutions.

____ Md. at ____, ____ A.2d at ____ (Majority Op. at 18). I disagree. The zoning ordinance at issue permits student mini-dormitories in residential zones provided the mini-dorms meet the rather strict requirements of the ordinance. If a student mini-dormitory fails to satisfy the requirements of the ordinance, it is still permissible within a residential zone provided a special exception is obtained. There is no contention that the dormitory regulation is arbitrary or irrational, only that the student/non-student classification is arbitrary and irrational.

It is not arbitrary or irrational for the Prince George's County Council to assume that, generally, residential college students will wish to live as close to their college campus as possible. It is not arbitrary or irrational for that legislative body to further assume college dormitories housing college students will, unless regulated, tend to be most highly concentrated in residential neighborhoods surrounding a college campus, whereas other non-student similar group residences will probably be more uniformly disbursed throughout the county. Because non-student group residences probably will not be as concentrated in any single geographic area as will student group residences near a college campus, there is a basis

for zoning regulations addressing these student mini-dorms. It is not irrational to regulate student mini-dorms by requiring a special exception so as to avoid too high a concentration of unregulated, possibly substandard, student mini-dormitories in residential neighborhoods adjacent to institutions of higher learning.

In Creative School v. Board, 242 Md. 552, 572, 219 A.2d 789, 801 (1966), this Court held that a Montgomery County Zoning Ordinance which required a special exception for a private school, with no similar requirement for a public school, did not violate constitutional equal protection guarantees. We stated that "if any state of facts reasonably can be conceived that would sustain the classification, the existence of that

state of facts at the time of the enactment of the statute must be assumed." Id. at 572, 219 A.2d at 800 (citing Lindsey v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S.Ct. 337, 340, 55 L.Ed. 369, 377 (1911)). Several states of facts reasonably can be conceived that would justify the student/non-student classification. We can conceive that some students of the University of Maryland and Bowie State University might not like to live in the campus dormitories and would prefer to live off campus but close to their universities. We can conceive that as full or part-time students, they may only have limited funds and are therefore more willing to tolerate crowded, inferior living quarters. Real estate speculators, seizing upon this

market, may buy small, inexpensive single-family residences close to these institutions of higher learning and rent formerly single-family homes to several students per house. Many of these students have cars which they might park on the street. As only nine-month tenants, the students may not be concerned about maintaining the property. Intolerant neighbors inconvenienced by the shortage of parking spaces and concerned about declining aesthetics of their neighborhoods may put their homes up for sale. Prospective buyers may not be eager to move into a neighborhood with neglected, crowded student group residences, so the speculators may be able to purchase more houses at deflated prices. The speculators, without doing

anything more than is minimally necessary to rent the properties, can create more mini-dorms in close proximity to these two Universities. Soon there may be a real danger that many quiet college residential neighborhoods will be saturated with student mini-dorms. These assumed justifications are not irrational or arbitrary.

It is also easy to conceive that there is no such problem with non-students or people with other occupations. These non-students are more likely to be employed full-time than are students, and with more money to spend on housing, they presumably may be less willing to tolerate crowded, inferior living conditions. Also, since they will live in the same residence all

year long, rather than only for nine months of the year, the premises are less likely to be neglected. Non-student groups residences are more likely to be disbursed throughout the county and not clustered around the two Universities.

These hypotheses are conceivable and should not be dismissed as irrational. This Court may believe that the hypothetical justifications for the zoning ordinance are not probable or not likely to occur, but that is not the issue. The issue is whether these hypothetical justifications for the legislation are irrational--they are not. There has been no showing that the County Council was wrong in believing there was a particular problem with student mini-dorms or assuming that,

because of their concentration around college campuses, student group residences could be a significant problem unless regulated.

Petitioners also contend that this zoning regulation is a denial of equal protection because it is underinclusive and, if the county is going to regulate group residences, it should uniformly regulate all group residences. I disagree. Even if the County Council chose to regulate one major aspect of the group residence problem (student group residences), rather than all aspects of the problem (all group residences), that should not invalidate the statute.

In Williamson v. Lee Optical of Oklahoma, the Supreme Court discussed why the judiciary must be hesitant to

void, on equal protection grounds, underinclusive legislation:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. (Citations omitted).

348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed.2d, 563, 573 (1955).

The fact that the County Council initially dealt with only one aspect of a problem does not render the legislation invalid.

This Court might not agree with the

legislative perception of the mini-dorm problem adjacent to a residential college campus or with the legislative solution, but we should not substitute our judgment for that of a legislative body. Nor should we declare any statute invalid unless the strong presumption of validity is overcome and unless it is clearly demonstrated that the legislative body acted irrationally and arbitrarily. The strong presumption of validity of the zoning ordinance at issue has not been overcome. This zoning regulation of student mini-dorms, that if unregulated, might become a problem in residential neighborhoods surrounding a college campus, has not been proven to be clearly arbitrary and irrational.

The majority opinion calls to mind

Justice Hugo Black's statements in Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963). Justice Black applauded courts for abandoning the practice of holding "laws unconstitutional when they believe the legislature has acted unwisely...." Id. at 730, 83 S.Ct. at 1031, 10 L.Ed.2d at 97. Instead, Justice Black expounded: "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Id. In reaching its holding today, this Court may have taken a step backward.

I would affirm the well-reasoned decision of Judgment Larnzell Martin of the Circuit Court for Prince George's

County as well as the judgment of the Court of Special Appeals. Both of those courts found a rational basis for creating the special exception zoning classification for mini-dorms

Chief Judge Murphy and Judge Rodowsky have authorized me to state that they join in the views expressed in this dissent.

REPORTED
IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1653

September Term, 1991

DONALD KIRSCH, et al.

v.

PRINCE GEORGE'S COUNTY, MARYLAND

Moylan,
Bell,
Davis,

JJ.

OPINION BY MOYLAN, J.

Filed: July 8, 1992

The appellants, Donald P. Kirsch, Martha Kaye Dunn, Stephanie Stockman and Daniel Cones, appeal an Order of Judge Larnzell Martin in the Circuit Court for Prince George's County granting the Motion for Summary Judgment by the appellee, Prince George's County. The appellants essentially raise two contentions:

> 1) That the Prince George's County Zoning Ordinance CB-152-1989 violates the Prince George's County Human Relations Act; and
>
> 2) That the Ordinance deprives the appellants of the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights.

On November 28, 1989, the County Council of Prince George's County, sitting as the District Council ("District Council"), enacted Zoning

Ordinance Bill Number CB-152-1989 entitled "Zoning Bill -- An Ordinance Concerning Mini Dormitories" ("Mini-Dorm Ordinance"). The Zoning Bill's title describes the Mini-Dorm Ordinance as being:

> "FOR the purpose of defining a mini-dormitory; establishing criteria for regulating this use; allowing it as a permitted use or by Special Exception in certain zones, subject to certain criteria; prohibiting the Board of Appeals from granting certain variances for mini-dormitories; prohibiting the Planning Board from approving departures from the required number of parking spaces for mini-dormitories; and requiring all existing uses to be in conformance with these regulations by July 1, 1991."

The objectives of the Mini-Dorm Ordinance were to be accomplished by amendment of §§ 27-107.1, 27-229(b), 27-515(b)(7), 27-547(b)(7), 27-568 and 27-

588(c) of the Zoning Ordinance of Prince George's County (ning Ordinance") and the addition of new §§ 27-249.1, 27-374.1, 27-445.7, 27-532.2, and 27-548.1.2 thereto.

Section 27-107.1(150.1) of the Zoning Ordinance defines "mini-dormitory" as:

> "[A]n off-campus residence located in a building that is, or was original constructed as a one-family, two family, or three-family dwelling which houses at lease three (3), but not more than five (5) individuals, all or part of whom are unrelated to one another by blood, adoption or marriage and who are registered full-time or part-time students at an institution of higher learning."

The Mini-Dorm Ordinance amends § 27-441(b)(6) of the Zoning Ordinance, by adding the mini-dormitory as a permitted use in all residential zones provided

the use complies with the requirements of § 27-445.7 of the Zoning Ordinance. A mini-dormitory that does not satisfy the requirements of § 27-445.7 is permissible within the affected residential zones only by special exception.

The amended Zoning Ordinance imposes the following requirements on the construction of mini-dormitories and their environs:

> "(a) A mini-dormitory permitted (P) in the Table of Uses shall be subject to the following:
>
> (1) The property shall be maintained in accordance with all applicable provisions of the County Code;
>
> (2) Rooms used for sleeping purposes shall have not less than seventy (70) square feet per resident;

(3) All parking spaces shall be provided on-site, in accordance with Part 11;

(4) Parking spaces provided solely for, and on the same lot with, the mini-dormitory may be located one behind the other (the front space may be used as access to the rear space);

(5) The number of driveway entrances authorized shall not exceed one (1) driveway entrance per lot or per street on which the subject lot has frontage (i.e., a corner lot), unless such driveway entrances were in existence on November 28, 1989;

(6) The uses shall not alter the single-family residential character or appearance of the premises;

(7) The maximum percentage of lot coverage for a mini-dormitory shall be the same as that for the dwelling type that was originally constructed on the lot; and

(8) The maximum percentage of lot coverage may only be increased by the District Council in the form of a variance granted in connection

with the approval of a Special Exception."

Section 27-249.1 of the Zoning Ordinance provides for the certification of existing uses as nonconforming and permits amortization through July 1, 1991.

As provided by § 27-249.1(b) of the Zoning Ordinance, the purpose of the Mini-Dorm Ordinance is to:

> "[P]revent or control the detrimental effects upon neighboring properties, such as illegal parking and saturation of available parking by residents of mini-dormitories, litter, and noise."

The appellants in the instant case are persons who are or might be affected by the Mini-Dorm Ordinance if it becomes effective. Donald P. Kirsch owns a house located at 4805 Rittenhouse Street, Riverdale, from which he has

derived rental income. Martha Kaye Dunn is employed in the business of property management. She is the owner of seven houses located in Prince George's County. The appellants Stephanie Stockman and Daniel Cones are students at the University of Maryland, College Park Campus. They reside off-campus and rent living space that would be affected by the Mini-Dorm Ordinance.

The appellee, Prince George's County ("County"), is a political subdivision of the State organized under Article XI-A, Constitution of Maryland, with divers powers expressed throughout the Annotated Code. Article 28, § 8-101 of the Code provides that with respect to zoning matters, the County Council is designated the District Council. That Section sets out the powers with which

the District Council is invested:

> "(b) Grant of zoning power. -- (1) Each district council, respectively, in accordance with the conditions and procedures specified in this article, may by ordinance adopt and amend the text of the zoning ordinance and may be resolution or ordinance adopt and amend the map or maps accompanying the zoning ordinance text to regulate, in the portion of the regional district lying within its county, (i) the location, height, bulk, and size of buildings, other structures, and units therein, building lines, minimum frontages, depths and areas of lots, and percentages of lots which may be occupied; (ii) the size of lots, yards, courts, and other open spaces; (iii) the erection of temporary stands and structures; (iv) the density and distribution of population; (v) the location and uses of buildings and structures and units therein for trade, industry, residence, recreation, agriculture, public activities, and other purposes, and (vi) the uses of land, including surface, subsurface, and air rights

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> therein, for building, trade, industry, residence, recreation, agriculture, forestry, or other purposes."

Seeking to enjoin the County from enforcing the Mini-Dorm Ordinance, the appellants filed a Motion for Interlocutory Injunction in the Circuit Court for Prince George's County on February 14, 1991. The appellants' motion was granted. The appellants also filed a Motion for Summary Judgment in the Prince George's County Circuit Court on February 14. The County filed its own Motion for Summary Judgment in that court on March 28. Judge Martin granted the County's Motion. By Order dated August 1, 1991, Judge Martin ruled that the Mini-Dorm Ordinance was constitutional and did not infringe upon the appellants' rights. This appeal

followed.

The appellants contend that the Mini-Dorm Ordinance violates the Prince George's County Human Relations Act. Secondarily, they argue that the Ordinance contravenes the Equal Protection Clause of the Fourteenth Amendment. We address the appellants' second argument first, as it is dispositive of both contentions.

It is beyond cavil that "[w]hen a local legislative body enacts a zoning ordinance, pursuant to powers granted by the Legislature," there is a strong presumption of validity, and "'strong evidence' of error is required to overcome the presumption." Cardon Investments v. Town of New Market, 55 Md. App. 573, 579, 466 A.2d 504 (1983), aff'd 302 Md. 77, 485 A.2d 678 (1984);

Howard County, Md. v. Dorsey, 292 Md. 351, 355, 438 A.2d 1339 (1982). See Mayor and Alderman of City of Annapolis v. Annapolis Waterfront Co., 284 Md. 383, 394, 396 A.2d 1080 (1979) (where legislative body has 'enacted zoning ordinance under powers granted by Legislature, presumption of validity attaches to act as exercise of police power'). Moreover, in reviewing zoning or rezoning by the County Council acting in its legislative capacity, "the function of this Court is a narrow one." Bishop v. Board of County Com'rs of Prince George's County, 230 Md. 494, 501, 187 A.2d 851 (1963). Unless the action is "arbitrary, capricious, unreasonable, discriminatory or beyond statutory or constitutional limitations, the courts cannot set it aside." Id.

(emphasis added). The burden is upon the party challenging the validity of the zoning ordinance to demonstrate its invalidity. The appellants have failed to meet that burden.

A municipality or county may, for a legitimate zoning purpose, "distinguish among occupants making the same use of single-family dwellings." Y.M.C.A. of Summit, N.J. v. Bd. of Adj., Summit, 141 N.J. Super. 315, 358 A.2d 211 (N.J. Super. A.D., 1976), aff'g 134 N.J. Super. 384, 341 A.2d 356 (N.J. Super. L., 1975). Accord City of White Plains v. Ferraioli, 34 N.Y.2d 300, 357 N.Y.S.2d 449, 313 N.E.2d 756 (1974); Township of Ewing v. King, 131 N.J. Super. 29, 328 A.2d 242 (1974), rev'd on other grounds, 69 N.J. 67, 350 A.2d 482 (1976). This includes distinctions made

between students and non-students. See Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974); Moore v. East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (Stewart, Rehnquist, JJ., dissenting); Ferraioli, 313 N.E.2d 756; City of Long Beach v. California Lambda etc. Fraternity, 63 Cal. Rptr. 419, 255 C.A.2d 789 (Cal. App. 2 Dist., 1967); Pettis v. Alpha Chapter of Phi Beta Pi, 115 Neb. 525, 213 N.W. 835 (1927).

A county's desire to eliminate or ameliorate property uses that conflict with a "stable, uncongested single family environment" is among the zoning purposes considered "legitimate" by courts. Ferraioli, 313 N.E.2d at 758. See Village of Belle Terre, 416 U.S. 1, 94 S.Ct. 1546, 39 L.Ed.2d 797 (1974).

When "'intensity of use, i.e., overcrowding of dwelling units and facilities,' is a factor in causing anti-social conduct, zoning ordinances can . . . be used for the purposes of control." Township of Ewing v. King, 328 A.2d at 243 (quoting Kirsch Holding Co. v. Manasquan, 59 N.J. 241, 254, 281 A.2d 513 (1971). Accord Y.W.C.A. of Summit v. Board of Adjustment, 341 A.2d 356.

In Village of Belle Terre, the zoning ordinance at issue restricted land use to one-family dwellings and prohibited occupancy of a dwelling by more than two unrelated persons "as a family." The ordinance permitted, however, occupancy by any number of persons related by blood, adoption or marriage. A property owner who rented

his property to six unrelated college students challenged the ordinance after he was cited for its violation. The Supreme Court upheld both the zoning ordinance and the principle of land use restriction upon which it was founded. In so doing, it observed at 416 U.S. 9 that:

> "The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.
>
> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make

> the area a sanctuary for people." (citation omitted).

In White Plains v. Ferraioli, the issue before the New York Court of Appeals was whether a "group home," consisting of a married couple and their two children, together with 10 foster children, qualified as a single family unit within the meaning of the City's zoning ordinance. In reaching its conclusion that a group home was a single family unit, the Court distinguished the attributes of a group home with those of a dwelling housing students. It observed that:

> "The group home is not, for purposes of a zoning ordinance, a temporary living arrangement as would be a group of college students sharing a house and commuting to a nearby school (cf. Village of Belle Terre v. Boraas, ____ U.S. ____, 94 S.Ct. 1536, 39 L.Ed.2d 797 [1974]). Every year or so, different

> college students would come to take the place of those before them. There would be none of the permanency of community that characterizes a residential neighborhood of private homes.
>
> . . . High density uses, for example, may be restricted; so too those uses which are associated with occupancy by numbers of transient persons may be limited.
>
> . . . .
>
> . . . So long as the group home bears the generic character of a family unit as a relatively permanent household, and is not a framework for transients or transient living, it conforms to the purpose of the ordinance."

Ferraioli, 313 N.E.2d at 758.

In the case sub judice, the Mini-Dorm Ordinance was enacted by the County in an effort to mollify the potentially irksome conditions emanating from student housing and impacting detrimentally upon the

surrounding residential community. As observed above, this is undoubtedly a legitimate goal of government. Furthermore, the group or class of persons affected by the Mini-Dorm Ordinance -- students attending institutions of higher learning -- is directly responsible for the problems the County seeks to eliminate. As the California Court of Appeals observed in City of Long Beach:

> "'And . . . speaking of college students generally, the court observes that it is a matter of common knowledge and well established that groups of students are for the most part exuberant, boisterous, and hilarious, and that they do not ordinarily keep regular hours and are addicted to the use and abuse of vibrant and sonorous musical instruments.'"

255 C.A.2d at 796 (quoting Pettis, 213

N.W. at 837-838). See Mayor & C.C. of Balto. v. Poe, 224 Md. 428, 435, 168 A.2d 193 (1961) (observing that "youth tends to overflow with exuberance to the point of creating disturbance and disorder"). The method devised by the County to actualize its goal was rational.

The appellants argue that the Mini-Dorm Ordinance impermissibly discriminates against a "protected" or "suspect" class -- students -- and impinges upon a "fundamental right" -- freedom of association. They contend that, as a result, the Mini-Dorm Ordinance violates the Equal Protection Clause of the Fourteenth Amendment and the equal protection guarantee of Article 24 of the Maryland Declaration of Rights. They assert that because of

the status of its targets, the Mini-Dorm Ordinance must be analyzed under the rigorous "strict scrutiny" standard in order to determine whether it passes constitutional muster. The appellants are in error.

The Supreme Court has strictly limited the application of the "strict scrutiny" standard of review in cases involving the equal protection guarantee to two situations: 1) where a governmental classification distinguishes between persons upon a "suspect" basis and 2) where a governmental act classifies people in terms of their ability to exercise a fundamental right. J. Nowak, R. Rotunda, J. Young, Constitutional Law § 14.3, at 530-31 (3d ed. 1986). With regard to the first situation, laws that

classify persons on the basis of either their "status as a member of a racial minority or on the basis of their national origin will be deemed suspect." Id. at 531. The Supreme Court has also held that "laws which classify persons in terms of alienage . . . will be deemed suspect and subject to this test." Id.

The appellants, as students, are not members of a suspect class. Furthermore, the Mini-Dorm Ordinance does not burden a "fundamental right." The appellants' claim that the ordinance in question invades constitutionally protected rights of association and privacy was answered by the Supreme Court's Belle Terre decision. The argument was there made that "a municipality could not zone its land

exclusively for single-family occupancy because to do so would interfere with protected rights of privacy or association" of students. Moore v. East Cleveland, 431 U.S. at 534. The Belle Terre Court rejected that contention and held that "the ordinance at issue 'involve[d] no fundamental right guaranteed by the Constitution, such as . . . the right of association.'" Id. "The Belle Terre decision thus disposes of the appellants contention to the extent they focus . . . on general notions of" association or privacy. Id.

The appellants contend, subsidiarily, that "even under a rational basis standard of review, the Mini-Dorm Ordinance is an unreasonable exercise of the County's zoning power." Once again, the appellants miss the

mark. Under the "rational basis" standard of review, a court is to ask only "whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution." J. Nowak, § 14.3, at 530. It has been said that "so long as it is arguable that the [legislative body] had such a basis for creating the classification a court should not invalidate the law." Id. We have already concluded that a rational relationship exists between the classification at issue, and the legitimate, lawful goal that the legislation was designed to achieve. Consequently, there is no equal protection violation.

The appellants' assertion that the

Mini-Dorm Ordinance violates Article 24 of the Maryland Declaration of Rights will not detain us long. The Maryland Constitution contains no equal protection clause. It has been held, however, that "the Due Process Clause of the Maryland Constitution, contained in Article 24 of the Maryland Declaration of Rights, embodies the concept of equal protection of the laws to the same extent as the Equal Protection Clause of the Fourteenth Amendment." Murphy v. Edmonds, 325 Md. 342, 353, 601 A.2d 102 (1992). The courts of this State have "taken the position that the Maryland equal protection principle applies 'in like manner and to the same extent as' the Equal Protection Clause." Id. at 354 (quoting Attorney General v. Waldron, 289 Md. 683, 704-705, 426 A.2d

929 (1981)). Thus, United States Supreme Court opinions "concerning the Equal Protection Clause . . . 'are practically direct authorities' with regard to Article 24." Id. (quoting Waldron, 289 Md. at 705). In light of our conclusion that the Mini-Dorm Ordinance does not violate federal equal protection law, a fortiori, it does not violate Article 24.

The appellants contend that the Mini-Dorm Ordinance is unconstitutional because it is "overbroad and vague and therefore is not 'narrowly tailored.'" Two closely related doctrines "particularly important in dealing with free speech issues" are the dual prohibitions against overbreadth and vagueness of a statute. J. Nowak, § 16.8, at 840. Essentially, these

doctrinal guideposts ensure that, in those instances where the State does have the power to regulate an area, that power is exercised so it does not, "'in attaining a permissible end, unduly infringe the protected freedom.'" Id. (quoting Cantwell v. Connecticut, 310 U.S. 296, 304, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)). A vagueness-overbreadth inquiry "focuses on whether a law states its requirements in terms" so vague and/or overbroad "that persons of reasonable intelligence 'must necessarily guess at its meaning'" and scope. Landover Books v. Prince George's County, 81 Md. App. 54, 81, 566 A.2d 792 (1989) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 607, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)).

Having considered the language of

the Mini-Dorm Ordinance, we hold that it is neither "overbroad" nor "vague." Even if we had determined that the ordinance was overbroad or vague, however, this would not necessarily lead us to conclude that the ordinance was unconstitutional. The two closely related doctrines of overbreadth and vagueness were primarily designed to ensure that laws that regulate fundamental constitutional rights, "such as the freedoms of speech, assembly, or association," are not so vague or overbroad that they have an "'in terrorem" effect, deterring persons form engaging in activities . . . that are of particular constitutional importance." J. Nowak, § 16.9, at 846. "An unclear law relating to business property use, such as a zoning statute," by contrast,

"would only chill activity without special constitutional significance (until such time as the statute is clarified by appropriate state courts)," and result in no constitutional violation.

The appellants go on to assert that, quite aside from its alleged constitutional infirmities, the Mini-Dorm Ordinance violates the Prince George's County Human Relations Act ("Act"). Prince George's County Code, 1987 Edition, as amended, §§ 2-185, et seq. The language of the Act indicates otherwise. Section 2-185(a) of the Act provides in relevant part:

> "It shall be a function of the County government to foster and encourage the growth and development of the County in such a manner that all persons shall have an equal opportunity to pursue their lives free of discrimination imposed

because of race, creed, color, sex, national origin, age, occupation . . .. Discriminatory practices based upon the foregoing criteria are declared to be contrary to the public policy of the County."

Section 2-186(a)(3) defines

"discrimination" as:

> "[A]cting or failing to act, or unduly delaying any action regarding any person because of race, creed, color, sex, national origin . . . occupation . . . in such a way that such person is adversely affected in the areas of housing, employment . . .."

Significantly, "occupation: is

defined as:

> "[T]he principal lawful activity of one's life. Persons to be protected include but are not limited to students, welfare recipients, retired persons, physically or mentally handicapped persons . . . and any persons irrespective of income **who are denied the equal protection of the laws**. (emphasis added).

Section 2-186(a)(12). According to the

context of the plain language of the Act, the Mini-Dorm Ordinance does not violate its terms. The appellants would have us hold that the Act prohibits the County from imposing upon any of the groups enumerated in the Act any and all legislatively selected distinctions between those groups and others. The Act does not sweep so broadly. By its own terms, the Act seeks to ensure only that those groups -- students, retired persons, etc. -- are not "denied the equal protection of the laws." As we have already held, the Ordinance does not deny equal protection.

IN THE CIRCUIT COURT OF MARYLAND
FOR PRINCE GEORGE'S COUNTY

DONALD KIRSCH, et al.	:	
	:	
Plaintiffs	:	
	:	
v.	:	CAE 90-15934
	:	
PRINCE GEORGE'S COUNTY MARYLAND	:	
	:	
Defendant	:	

OPINION AND ORDER OF COURT

This matter comes before this Court on the Plaintiffs' Complaint for Declaratory Relief, filed July 3, 1990, challenging Prince George's County Bill CB-152-1989, enacted by the County Council of Prince George's County, Maryland, sitting as the District Council, November 28, 1989. The Plaintiffs seek to have this ordinance declared invalid. Certain bases for such invalidity are cited:

Count 1: that the ordinance

violates the Prince George's County Human Relations Act.

Count 2: that the ordinance violates the Fourteenth Amendment of the United States Constitution's guarantee of equal protection under the law.

Count 3: that the ordinance violates the Fifth Amendment of the United States Constitution's guarantee against the taking of property without due process of law.

Count 4: that the ordinance violates the First Amendment of the United States Constitution's guarantee of the right to freely associate.

Count 5: that the ordinance violates the Plaintiffs' rights of privacy as such rights exist under the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the United States Constitution.

February 14, 1991, the Honorable William H. McCullough issued an Order

whereby Prince George's County was

> enjoined from enforcing CB-152-1989 concerning mini dormitories until a final determination is made as to the validity of that Ordinance.

This Interlocutory Injunction remains in effect.

The Court presently will issue a determination of the validity of CB-152-1989 on the basis of the Plaintiffs' Motion for Summary Judgment and the County's Counter-Motion for Summary Judgment. Maryland Rule 2-501(e) authorizes that

> The Court shall enter judgment in favor of or against the moving parties if the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

The Court is satisfied that the

pleadings, answers to interrogatories and admissions filed herein "show that there is no genuine dispute as to any material fact and that" the "party in whose favor judgment is entered is entitled to judgment as a matter of law."

I. BACKGROUND FACTS

November 28, 1989, the County Council of Prince George's County, Maryland, sitting as the District Council ("the District Council"), enacted CB-152-1989 entitled, "Zoning Bill -- An Ordinance Concerning Mini Dormitories" ("the Ordinance"). The title describes the Ordinance as being

FOR the purpose of defining a mini-dormitory;

establishing criteria for regulating this use; allowing it as a permitted use or by Special Exception in certain zones, subject to certain criteria; prohibiting the Board of Appeals from granting certain variances for mini-dormitories; prohibiting the Planning Board from approving departures from the required number of parking spaces for mini-dormitories; and requiring all existing uses to be in conformance with these regulations by July 1, 1991.

The purposes set forth in the title were sought to be accomplished by amendment of §§ 27-107.1, 27-229(b), 27-441(b)(6), 27-515(b)(7), 27-547(b)(7), 27-568 and 27-588(c) and addition of new §§ 27-249.1, 27-374.1, 27-445.7, 27-532.2, and 27-548.1.2 of the Zoning Ordinance of Prince George's County, Maryland, being also Subtitle 27, Zoning, of the Prince George's County Code, (1987 edition as amended by CB-23-1988, CB-38-i988, CB-

39-1988, CB-61-1988, CB-16-1989, CB-34-1989, CB-35-i989, and CB-86-1989).

Section 27-107.1(150.1) of the Zoning Ordinance, by virtue of the Ordinance, provides the following definition of a "mini-dormitory"

> an off-campus residence located in a building that is, or was originally constructed as a one-family, two-family, or three-family dwelling which houses at least three (3), but not more than five (5) individuals, all or part of whom are unrelated to one another by blood, adoption or marriage and who are registered full-time or part-time students at an institution of higher learning.

A. DESCRIPTION OF THE ORDINANCE

The Ordinance amends § 27-441(b)(6) of the Zoning Ordinance to add a mini-dormitory as a permitted use in all residential zones provided the use complies with the requirements of new §

27-445.7. If a mini-dormitory fails to satisfy the requirements of § 27-445.7, it is permissible within these residential zones only by Special Exception.

The Ordinance amends § 27-515(b)(7) of the Zoning Ordinance to permit a mini-dormitory in certain comprehensive design zones, specifically M-A-C, L-A-C, R-U, R-M, R-S, provided the mini-dormitory complies with the requirements of new § 27-532.2. Any mini-dormitory which fails to meet the requirements of § 27-532.2 is permitted only by Special Exception.

The Ordinance amends § 27-547(b)(7) of the Zoning Ordinance to permit a mini-dormitory in the M-X-T Zone provided it meets the requirements of new § 27-548.1.2. If it fails to meet

the requirements of this new section, it is only permitted by Special Exception.

There is no distinction between the requirements imposed on mini-dormitories among §§ 27-445.7, 27-532.2, and 27-548.1.2 of the Zoning Ordinance. These requirements are as follows:

> (a) A mini-dormitory permitted (P) in the Table of Uses shall be subject to the following:
>
> (1) The property shall be maintained in accordance with all applicable provisions of the County Code;
>
> (2) Rooms used for sleeping purposes shall have not less than seventy (70) square feet per resident;
>
> (3) All parking spaces shall be provided on-site, in accordance with Part 11;
>
> (4) Parking spaces provided solely for,

and on the same lot with, the mini-dormitory may be located one behind the other (the front space may be used as access to the rear space);

(5) The number of driveway entrances authorized shall not exceed one (1) driveway entrance per lot or per street on which the subject lot has frontage (i.e., a corner lot), unless such driveway entrances were in existence on November 28, 1989;

(6) The use shall not alter the single-family residential character or appearance of the premises;

(7) The maximum percentage of lot coverage for a mini-dormitory shall be the same as that for the dwelling type that was originally constructed on the lot; and

> (8) The maximum percentage of lot coverage may only be increased by the District Council in the form of a variance granted in connection with the approval of a Special Exception.

These requirements appear to be "additional requirements" to those required for certain uses (discussed infra, at p. 24) that might otherwise be mini-dormitories but for the fact that the occupants are not "registered full-time or part-time students at an institution of higher learning."

Where mini-dormitories are permitted by Special Exception, the requirements are as set forth in new § 27-374.1. Specifically,

> (a) A mini-dormitory may be permitted, subject to the following:

(1) The application shall be accompanied by a statement which sets forth an acceptable maintenance plan;

(2) The site plan shall include the number, type, and location of exterior trash receptacles;

(3) Rooms used for sleeping purposes shall have not less than seventy (70) square feet per resident;

(4) All required parking spaces shall be provided on-site, except as follows:

(A) The required number of parking spaces may be reduced on-site by one (1) space if on-street parking is allowed in front of the subject lot; or

(B) The required number of parking spaces may be provided off-site if:

(i) The mini-dormitory is located within five hundred

(500) feet of an existing parking lot;

(ii) The owner of the mini-dormitory has written permission from the parking lot owner for the residents of the mini-dormitory to use the parking lot; and

(iii) The existing parking lot has sufficient surplus parking spaces available to provide the number of spaces required;

(5) Parking spaces provided solely for, and on the same lot with, the mini-dormitory may be located one behind the other (the front space may be used as access to the rear space);

(6) The number of driveway entrances authorized shall not exceed one (1) driveway entrance per building lot or per street on which the subject lot has frontage (i.e., a

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corner lot), unless such driveway entrances were in existence on November 28, 1989;

(7) The use shall not alter the single-family residential character or appearance of the premises;

(8) The maximum percentage of lot coverage for a mini-dormitory shall be the same as that for the dwelling type that was originally constructed on the lot; and

(9) The maximum percentage of lot coverage may only be increased by the District Council in the form of a variance granted in connection with the approval of a Special Exception.

Section 27-249.1 provides for the certification of existing uses as nonconforming and permits amortization through July 1, 1991. Notwithstanding the fact that this date has come and gone, this new provision is of relevance

because (1) it allows continued operation either as a Special Exception or if its use meets the requirements of § 27-445.7 and, (2) (perhaps more importantly) subsection (b) sets forth the following purpose:

> The purpose of this Section is to prevent or control detrimental effects upon neighboring properties, such as illegal parking and saturation of available parking by residents of mini-dormitories, litter, and noise.

Considering that such use is permitted on a nonconforming basis upon receipt of a Special Exception or upon compliance with the requirements of § 27-445.7, **this stated purpose clearly extends beyond the July 1, 1991, amortization termination.**

The final apparent distinctions between mini-dormitories and other uses

that do not come under the requirements for a mini-dormitory by virtue of the fact that the occupants are not "registered full-time or part-time students at an institution of higher learning" are the requirements that there be one parking space per resident (§ 27-568(a)(1)) and that any variance from the parking requirement be subject to grant only by the District Council (§ 27-588(c)(2)).

B. THE PARTIES

The Plaintiffs in this action are persons who are or might be affected by the Ordinance if it is allowed to take effect. Donald P. Kirsch, owns a house at 4805 Rittenhouse Street, Riverdale, Maryland 20737, from which he has derived rental income. This property, acquired January 26, 1986, has four

bedrooms.[1] The Plaintiff, Martha Kaye Dunn, is employed in the business of property management. So employed since 1979, she has identified seven housing dwellings located in the County owned by her, all located in College Park. These rental properties, each with four or five bedrooms, were acquired between March 1979 and May 1984. The Plaintiffs, Stephanie Stockman and Daniel Cones, are described in paragraphs 3 and 4 of the Complaint as students

> at the University of Maryland, College Park campus, who currently live off campus and rent living space that would be adversely affected by [the] ordinance.

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1. Information regarding the Plaintiffs Donald P. Kirsch and Martha Kaye Dunn is obtained from their Answers to County Interrogatories 4 through 13.

The Defendant, Prince George's County, Maryland ("the County") is a political subdivision of the State organized under Article XI-A, Constitution of Maryland, with certain powers expressed throughout the Annotated Code of Maryland. With respect to zoning matters, Article 28, § 8-101 of the Code prescribes that the County Council is designated as the District Council in which capacity it has been granted certain powers pertinent to consideration of the Ordinance:

> (b) Grant of zoning power. -- (1) Each district council, respectively, in accordance with the conditions and procedures specified in this article, may by ordinance adopt and amend the text of the zoning ordinance and may by resolution or ordinance adopt and amend the map or maps accompanying the zoning

> ordinance text to regulate, in the portion of the regional district lying within its county, (i) the location, height, bulk, and size of buildings, other structures, and units therein, building lines, minimum frontages, depths and areas of lots, and percentages of lots which may be occupied; (ii) the size of lots, yards, courts, and other open spaces; (iii) the erection of temporary stands and structures; (iv) the density and distribution of population; (v) the location and uses of buildings and structures and units therein for trade, industry, residence, recreation, agriculture, public activities, and other purposes; and (vi) the uses of land, including surface, subsurface, and air rights therein, for building, trade, industry, residence, recreation, agriculture, forestry, or other purposes.

II. DISCUSSION

Count 1

The Plaintiffs' first ground for challenging the validity of the Ordinance is that it violates the

County's Human Relations Act ("the Act"). Prince George's County Code, 1987 Edition, as amended, §§ 2-185, et seq. Plaintiffs rely on §§ 2-185(a), 2-186(a)(3) and 2-186(a)(12) of the Act as prohibiting any action which discriminates or compels landlords to discriminate against students because of their "occupation" as such. It is urged that the Ordinance "specifically requires homeowners to violate the law by discriminating against, and not renting their premises to, students."

As a general principle, a political subdivision (as an actor) is not subject to compliance with its laws or other enactments in reference to performance of its governmental functions unless it expressly so provides. Von der Haar v. City of St. Louis, 226 S.W.2d 376, 380

(1953) ("Tort liability cannot be imposed on a municipality for failure to observe the requirements of its own ordinances" (citing 4 Dillon, Municipal Corporations, § 1629)); Albany v. Burt, 76 S.E.2d 413, 426-27 (1953). See generally Tadjer v. Montgomery County, 300 Md. 539, 479 A.2d 1321 (1984). In reference to the Act, it is significant that there are only two instances which expressly address the Act's applicability to agencies of the County. The first instance occurs in § 2-186(a)(5):

> Employer shall mean any person engaged in commerce, industry, agriculture or a lawful profession, who for compensation has hired or contracted for the services of the one (1) or more employees, for a total of forty (40) or more hours in the current or preceding calendar year, or an agent of such person. Employer

> **does include the County of Prince George's to the extent provided in this Division.** [Emphasis supplied.]

At § 2-229(a) of the Act, the investigatory power of the Human Relations Commission is expressly extended to certain complaints against "any law enforcement officer operating within the County." These two inclusions necessarily lead the Court to conclude that the remaining provisions of the Act are not applicable to the County except in order to fulfill the Commission's obligation with respect to employment discrimination and investigation of complaints against law enforcement officers. See Kirkwood v. Provident Savings Bank, 205 Md. 48, 55, 106 A.2d 103 (1953) ("[T]he maxim expressio unius est exclusio alterius .

. ., meaning that the expression of one thing implies the exclusion of another thing not mentioned, is . . . an auxiliary rule of statutory construction applied to assist in determining the intention of the legislature where such intent is not manifest from the language used.").

The provisions of the Act do not extend to any act of the County, whether legislative or executive, which might arguably relate to discrimination against students in the provision of housing. Of necessity, any person required to comply with any County law governing the same would be shielded from any liability for alleged violation of otherwise applicable provisions of the Act.

Count 2

In Count 2 of the Complaint, the Plaintiffs assert numerous bases upon which they seek to have the Ordinance declared invalid as violative of the Fourteenth Amendment of the United States Constitution. It is asserted that the Ordinance

1. Is "unconstitutionally under-inclusive," in that "[i]ndividuals who are unrelated, or if share a 'one-family, two-family, or three-family dwelling,' but are not 'registered full-time or part-time students at an institution of higher learning' are not affected by the Ordinance." Complaint,] 27;

2. Is "unconstitutionally over-inclusive, in that it penalizes and discriminates against all students seeking off-campus housing; whether or not all such students are the cause of stated problems to be alleviated by the [Ordinance]." Complaint,] 28;

3. Is "unconstitutionally over-broad in that it punishes and

deters the otherwise lawful exercise of freedom of association and privacy rights." Complaint,] 29;

4. Is "unconstitutionally vague in that the terms 'full or part-time student' and 'institution of higher learning' are undefined." Complaint,] 30;

5. Is "unconstitutionally vague because it lacks the necessary standards to guide the landlord in following the [Ordinance's] requirements." Complaint,] 31;

6. "[V]iolates the fundamental rights of students and non-students to associate with one another." Complaint,] 34; and

7. "[V]iolates the fundamental rights to privacy of students and non-students by invading the sanctity of their home and of their family status." Complaint,] 35.

The Plaintiffs further assert

1. That the Ordinance "(Flails to serve a compelling state interest and is unnecessary to accomplish its stated ends." Complaint,] 36;

2. That the Ordinance's "facial discrimination against students does not bear a substantial relationship to an important governmental objective." Complaint,] 37; and

3. That the Ordinance is "arbitrary and irrational and does not provide a rational means to serve a legitimate end." Complaint,] 38.

In its Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment, as well as oral argument, Plaintiffs have placed substantial reliance on the case of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). The County, in seeking to have the Ordinance declared valid, places heavy reliance in its Memorandum in Support of Defendant's Response and Defendant's Counter-Motion for Summary Judgment on the holding of the United

States Supreme Court in Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974).

A. STANDARD OF REVIEW

The Fourteenth Amendment, Section 1, United States Constitution, provides

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. **No State shall** make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor **deny to any person within its jurisdiction the equal protection of the laws.** [Emphasis supplied.]

The level of scrutiny required of a legislative act of a political subdivision which targets a cognizable group when its validity is challenged as violating the Equal Protection Clause

emphasized above is dependent on the nature of the group and the nature of the legislative act. As stated in Cleburne,

> **The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.** When social or economic legislation is at issue, the Equal Protection Clause allows the states wide latitude. [Citations omitted.] And the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

Id. at 440, 105 S.Ct. 3249.

The Court continues,

> The general rule gives way, however, when a statute classifies by race, alienage, or national origin... [T]hese laws are subjected to a strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. McLaughlin v. Florida, 379 U.S. 184, 192, 85 S.Ct. 283, 288, 13 L.Ed.2d 222

> (1964); Graham v. Richardson, 403 U.S. 365, 91 S.Ct 1848, 29 L.Ed.2d 534 (1971). **Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution.** Kramer v. Union Free School District No. 15, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); Skinner v. Oklahoma, ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).
>
> **Legislative classifications based on gender also call for heightened standard of review.** * * * A gender classification fails unless it is substantially related to a sufficiently important governmental interest. Mississippi University For Women v. Hogan, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982); Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976).

Id. at 440-441, 105 S.Ct. 3249.

With respect to cognizable groups of persons other than those discussed in the foregoing quote, in Cleburne the

Court remarked

> [W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the Courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. **In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.** [Emphasis supplied.]

Id. at 441-442, 105 S.Ct. 3249.

Although the County, through its Human Relations Act, has identified "students" as a group protected under that Act, such characterization does not bring students within a classification (specifically race, alienage, or national origin) which commands the strict scrutiny test which would require

that this Court find that the County demonstrate a compelling state interest to support the "discrimination" argued to be represented by the Ordinance. Further, the protection extended to students under the Act is not sufficient to bring the test of validity of the Ordinance under the "substantially related to a sufficiently important governmental interest standard" applicable to gender classifications.

As noted previously[2] the authority of the County Council to enact legislation while sitting as the District Council flows from Article 28 of the Annotated Code of Maryland. This Article is a land use statute. As such, it is appropriate that the Court

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2. Infra, at p.8.

determine the validity of the Ordinance in accordance with such standards as have been determined by the Supreme Court to be applicable to the consideration of economic and social legislation. In Village of Belle Terre v. Boraas, the Court recognized the applicable standard:

> We deal with economic and social legislation where legislatures have historically drawn lines which we respect against a charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989) and **bears a rational relationship to a [permissible] state objective.** Read v. Read, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225.

416 U.S. at 8, 94 S.Ct. 1536.

Therefore, unless it can be established that the Ordinance impinges

on their rights of association, against the taking of property without due process or privacy under the Constitution, the validity of the Ordinance is required to be measured by whether or not the County can satisfy the finder of fact that the enactment of the Ordinance represents a "rational means to serve a legitimate end." Therefore, preliminarily, it must be determined whether these constitutional rights are impinged on by the Ordinance.

In **Count 4**, Plaintiffs assert that the Ordinance violates their right of association under the First Amendment of the United States Constitution. This claim is presently considered.

There is no support that the Ordinance violates their right of association under the First Amendment.

Clearly, Plaintiffs Donald Kirsch and Martha Kaye Dunn's rights of association are not threatened since the properties they own giving them standing are rentals. The use conditions under the Ordinance simply affect the requirements that might be applicable depending on the composition of the group of persons who might rent the properties. These Plaintiffs may rent their properties to "families" or non"families" meeting the definition of a mini-dormitory.

As to the student Plaintiffs, Stephanie Stockman and Daniel Cones, their assertions that the Ordinance violates their rights of association are on no firmer ground than that of the parties in Village of Belle Terre, where the Supreme Court dismissed a similar claim brought by students challenging

the definition of "family" adopted by the Village with this limited discussion:

> The ordinance places no harm on other forms of association, for a "family" may, so far as the ordinance is concerned, entertain whomever it likes.

Id. at 9, 94 S.Ct. 1536.

Therefore, this Court finds that the Ordinance does not violate Plaintiffs' rights of association under the first Amendment.

In **Count 3**, the Plaintiffs assert that the Ordinance violates the Fifth Amendment guarantee against the taking of property without due process of law. There are no facts in the record to support this assertion. In this regard, the Court relies on the discussion above relating to Count 4. **Therefore, the Court finds that the Ordinance does not**

violate the rights of the Plaintiffs under the Fifth Amendment.

Under **Count 5**, the Plaintiffs allege that the Ordinance violates their rights of privacy under the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the United States Constitution. The asserted basis for such alleged violation is that the Ordinance invades the sanctity of the home of students and non-students as well as their family status. If one is to accept the establishment of a mini-dormitory use as such an invasion, the rationale would of necessity extend to any characterization of a cognizable group as a family. Considering the clear recognition by the Supreme Court of the right of a political subdivision to determine what constitutes a "family"

and (of necessity) what may be excluded from such characterization, the right of privacy cannot be said to be infringed by the Ordinance. See Moore v. City of East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977); Village of Belle Terre, supra. Therefore, the Court finds that the Ordinance does not violate the Plaintiffs right to privacy under the First, Fourth, Fifth, Ninth and Fourteenth Amendments.

On the basis of the foregoing it is clear that the only test upon which the validity of the Ordinance is required to be measured is that the County satisfy the finder of fact that the enactment of the Ordinance represents a "rational means to serve a legitimate end."

B. DOES THE MINI-DORMITORIES ORDINANCE SERVE A LEGITIMATE END?

We began our inquiry with examination of this question. Clearly, if a legitimate end is not disclosed by the record, there is no need to determine whether or not the means adopted by the County are rational.

The purposes of the legislation, as embodied in the Ordinance, are:

1. FOR the purpose of defining a mini-dormitory; establishing criteria for regulating this use; allowing it as a permitted use or by Special Exception in certain zones, subject to certain criteria; prohibiting the Board of Appeals from granting certain variances for mini-dormitories; prohibiting the Planning Board from approving departures from the required number of parking spaces for mini-dormitories; and requiring all existing uses to be in conformance with these regulations by July 1, 1991. Ordinance, Title.

2. The use shall not alter the single-family residential character or appearance of the

premises. Ordinance, §§ 27-374.1(a)(7), 27-445.7(a)(6), 27-532.2(a)(6) and 27-548.1.2(a)(6).

3. The purpose of this Section is to prevent or control detrimental effects upon neighboring properties, such as illegal parking and saturation of available parking by residents of mini-dormitories, litter, and noise. Ordinance, § 27-249.1(b).

The regulation of land uses has long been recognized by the Supreme Court as a legitimate exercise of the police power. Whatever the constitutional validity (or invalidity) of the means whereby the County has sought to effectuate the purposes of the Ordinance, it cannot reasonably be argued that the purposes listed above are not legitimate exercises of the police power. Accordingly, the Court finds that the stated purposes of the

Ordinance serve an end legitimately within the police power of the County.

C. ARE THE MEANS EMPLOYED RATIONALLY RELATED TO EXPRESSED PURPOSES?

To achieve the stated purposes, the County has employed certain means embodied in the Ordinance. They are discussed in this section.

The Ordinance begins by creating a distinct "category of persons who would otherwise qualify as a "family" but for the fact that certain of them "are registered full-time or part-time students at an institution of higher learning."[3] The Ordinance

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3. Section 27-107.1(a)(85)(C) of the Zoning Ordinance defines family as "Not more than five (5) individuals (excluding servants), all or a part of wom are unrelated to one another by blood, adiption or marriage and who maintain a common household in a 'Dwelling Unit'."

then proceeds to specify the terms and conditions when such use (mini-dormitory) is permitted "by right" or by "Special Exception." The specific elements of the Ordinance will be examined in order to identify the different treatment of a mini-dormitory as opposed to other residential uses.

The Ordinance amends the Table of Uses for Residential Zones to permit mini-dormitories in all residential zones except R-IOA, provided the requirements of § 27-445.7 are met. If these requirements are not met, such use is permitted in affected residential zones by Special Exception.

A "dwelling" is defined at § 27-107.1(a)(72) as "A single 'Building ' used for living facilities for one (1) or more 'Families'."

Under § 27-441(b)(6) "dwelling, one-family detached (in general)" is permitted in all residential zones except R-IOA, without condition. "Dwelling, one-family detached, cluster development" is permitted only in the R-R, R-80 and R-55 Zones. No Special Exception use is allowed. "Dwelling, one-family semi-detached" is permitted without condition in the R-35, R-20 and R-2 Zones. It is permitted in the R-30, R-30C, R-18, and R-IOA Zones "subject to all requirements applicable to R-T Zone (except as specifically modified for the R-20 Zone) "[4] This use is permitted in the R-R Zone "for zero lot line

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4. Conditions upon uses included in quotes are taken from footnotes in the Zoning Ordinance appearing at the end of the applicable Table of Uses.

development, in accordance with Optional Residential Design Approach Provisions of Subtitle 24." This last condition is also applicable to the use of property as a "dwelling, one-family semi-detached" in the R-80 and R-55 Zone subject to the additional condition that "slaughterhouse, fertilizer works, bone yards, plants for the reduction of animal matter, and any uses which are noxious or offensive because of odor, dust, smoke, gas, or noise are prohibited; may include a stable in conjunction with the agricultural use."

Section 27-441(b)(6) provides that "dwelling, two-family (in general is permitted in the R-T Zone "limited to dwelling units arranged one above the other." This use is permitted in the R-30, R-30C, R-18 and R-18C Zones "subject

to all requirements applicable to R-T Zone (except as specifically modified for the R-20 Zone)."

Section 27-441(b)(6) provides that "dwelling, two-family detached" is unconditionally permitted in the R-55 Zone. It is permitted in the R-T Zone "limited to dwelling units arranged one above the other." In the R-30, R-30C, R-18 and R-18C Zones it is permitted "subject to all requirements applicable to R-T Zone (except as specifically modified for the R-20 Zone)."

Section 27-441(b)(6) provides that "dwelling, one-family triple-attached, in general" is permitted only in the R-20 Zone.

Section 27-441(b)(6) provides that "dwellings, one-family triple-attached, cluster development, shown on a

preliminary plat of subdivision approved prior to September 1, 1986" is permitted in the R-80 and R-55 Zones subject to certain cluster development requirement.[5]

Section 27-441(b)(6) provides that "dwelling, three-family" is permitted unconditionally only in the R-T Zone. It is permitted in the R-30, R-30C, R-18 and R-18C Zones "subject to all requirements applicable to R-T Zone (except as specifically modified for the R-20 Zone)."

With respect to Comprehensive Design Zones, the Ordinance permits such use in all zones except the E-I-A Zone, provided the requirements of § 27-532.2

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5. These requirements are specified in footnote 32 of the Table of Uses for Residential Zones.

are met. Otherwise, the use is permitted in the indicated zones by Special Exception. By contrast, "dwelling (any type, except mobile homes)" is permitted in all Comprehensive Design Zones except the E-I-A Zone.[6]

Section 27-547(b)(7) governing the Mixed Use Zone provides that "dwelling (all types, except mobile homes)" are permitted. By contrast, the Ordinance would permit a mini-dormitory in this zone only if the requirements of § 27-548.1.2 are met. Otherwise the use is permitted by Special Exception.

The Ordinance amends the schedule of spaces required under § 27-568(a) of the Zoning Ordinance to require 1.0

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6. Zoning Ordinance, § 27-515(b)(7).

space per resident of a mini-dormitory.

For comparison, the following parking requirements, pertinent to this discussion, are as shown:

TYPE OF USE	NUMBER OF SPACES	UNIT OF MEASUREMENT
Congregate Living Facility for Elderly/physically Handicapped	1.0	4 Residents
Conversion of one-family detached dwelling (to include additional dwelling units)	1.0	Dwelling Unit
Dwelling unit within a building containing commercial or industrial uses	2.0	4 for each Dwelling Unit
Group residential facility	1.0	4 Residents
One-family detached dwellings:		
Cluster Develop.	1.5	Dwelling Unit
Mobile Home	2.0	Dwelling Unit
All Others	2.0	Dwelling Unit

Three-family dwelling	2.0	Dwelling Unit
Townhouse or other one-family attached dwelling	2.0	4 Dwelling Unit
Two-family dwelling	2.0	Dwelling Unit

* * * * *

Dormitory "	1.0	2 Residents
Fraternity or Sorority House	1.0	2 Residents
Hotel, not including restaurant or other accessory use requirement	1.0	2 Guest Rooms
Motel	1.0	Guest Room
Rooming House, Boardinghouse, or other renting of guest rooms in a dwelling	1.0	Guest Room

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Private School:

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10th grade and above (including adult education)	1.0	3 Students

D. EXAMINATION OF SPECIFIC REQUIREMENTS

1. Distinguishing Students from Non-Students

See discussion beginning on page 34 under Section G.

2. Permitted Use

As referenced previously,[7] when a mini-dormitory is permitted as a use in any zone identical requirements must be met. That is, the requirements specified in §§ 27-445.7, 27-532.2 and 27-548.1.2 are identical. For ease of reference, each requirement will be stated separately and followed immediately by a discussion of any distinction between

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7. Supra, at p.4.

the requirement and any other requirement that may be applicable to a "family" living in a one-family, two-family or three-family dwelling under the Zoning Ordinance.

(1) The property shall be maintained in accordance with all applicable provisions of the County Code.

Very clearly, **this requirement is not distinct to a mini-dormatory.** All uses permitted under the Zoning Ordinance must comply with applicable provisions of the County Code in the absence of some exemption expressed or by operation of law.

(2) Rooms used for sleeping purposes shall have not less than seventy (70) square feet per resident.

Upon examination of Part 5 of the Zoning Ordinance governing Residential Zones (§§ 27-419, et seq.), a similar

limitation for other residential uses is not readily apparent. However, regulations beginning at § 27-442 of Part 5 clearly set forth certain requirements as to lot area, lot coverage, lot width, frontage and similar matters which effectively limit or otherwise control in some manner the space available for "sleeping purposes," depending on the number of bedrooms and the dynamics of the real estate market. Therefore, the question will become whether or not this requirement of not less than 70 square feet per resident bears a rational relationship to the purposes of the Ordinance.

(3) All parking spaces shall be provided on-site in accordance with Part 11.

Part 11 of the Zoning Ordinance is titled "Off-Street Parking and Loading."

It is applicable to all uses. To the extent that the requirements are distinct for mini-dormitories, such distinction is created by the amendment of § 27-568(a)(1) embodied within the Ordinance. Examining this particular amendment, it is very clear that the parking requirements for a mini-dormitory are more "burdensome" (perhaps "restrictive" is a better characterization) than for one-family, two-family and three-family dwellings. It is perhaps here that the distinction between the "traditional family" or "family" as defined in § 27-107.1(a)(1), of the Zoning Ordinance and the definition of a mini-dormitory becomes most clearly functional. For if one examines the schedule of spaces required, particularly for those uses

listed in the Table previously set forth in this Opinion,[8] one notes that more burdensome space requirements are imposed upon those uses that rely on a more transient population than that normally associated with a traditional family. Similarly, the parking requirements become more burdensome when the use population is more likely to involve persons who traditionally have the power to own or otherwise legitimately possess a motor vehicle. Attention is specifically directed to the space requirements for a dormitory,[9]

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8. Infra, at p. 22.

9. Section 27-107.1(a)(69) defines a dormitory as "an 'accessory building' used for lodging purposes in connection with a school or other instutution, or as a farm tenant dwelling." As an accessory use, a dormitory would be permitted wherever such primary use is

fraternity or sorority house, hotel, motel, rooming house, boardinghouse, or other renting of guest rooms in a dwelling and private school for 10th grade and above, including adult education. **The question thus becomes whether the more burdensome requirement embodied in the Ordinance for parking is rationally related to the purposes stated in the Ordinance.**

(4) Parking spaces provided solely for, and on the same lot with the mini-dormitory, may be located one behind the other (the front space may be used as access to the rear space.

The Court is unable to find a comparison between this "requirement" as it relates to mini-dormitories and one-family, two-family and three-family

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permitted.

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dwellings. Its validity would appear to rise or fall with the permissibility or reasonableness of Requirement 3 discusses immediately above relating to number of spaces. Suffice it that reasonable persons would construe this "requirement" to be merely supportive of meeting Requirement 3. That is, it can hardly be said to create a harm if the remainder of the requirements are determined to be valid.

(5) The number of driveway entrances authorized shall not exceed one (1) driveway entrance per lot or per street on which the subject lot has frontage (i.e., a corner lot), unless such driveway entrances were in existence on November 28, 1989.

Similar to the preceding requirement, the validity would appear to rise or fall with the permissibility or reasonableness of the Requirement 3.

(6) The use shall not use or alter

the single-family character or appearance of the premises.

Although this requirement, presumably, is of a nature similar to Requirement 1, it is considered by the Court to be more in the nature of a statement of purpose and will be treated as such.

(7) The maximum percentage of lot coverage for a mini-dormitory shall be the same as that for the dwelling type that was originally constructed on the lot.

This requirement is not distinct in any manner from the requirement applicable to any other residential use.

(8) The maximum percentage of lot coverage may only be increased by the District Council in the form of a variance granted in connection with the approval of a Special Exception.

What appears to be unique here is the requirement that only the District Council may increase t@e maximum

percentage of lot coverage "in the form of a variance granted in connection with the approval of a Special Exception." **The question becomes whether reservation of this power rationally relates to attaining the stated purpose of the Ordinance.**[10]

3. Special Exception Use.

Section 27-374.1 governs the grant of a Special Exception where a mini-dormitory does not meet the applicable requirements as discussed above. The Special Exception requirements are distinct from the permitted use

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10. Effectively, this provision requires an examination of whether the District Council has the authority under Article 28, § 8-111(b)(3) to deny the Board of Zoning Appeals the authority to hear an application for a variance. In light of the fact that this specific issue was not raised, the Court declines to address it.

requirements only in reference to the areas discussed immediately below. For ease of identification, requirements are numbered as they appear in § 27-374.1(a). Only requirements (1), (2) and (4) are discussed because the remaining requirements are identical to requirements applicable for a mini-dormitory without necessity for a Special Exception.

(1) The application shall be accompanied by a statement which sets forth an acceptable maintenance plan.

(2) The site plan shall include the number, type and location of exterior trash receptacles.

Part 4 of the Zoning Ordinance includes various requirements for the granting of Special Exceptions. Site plans and statements addressing the impact of the proposed use are routinely

required. As is readily discernible upon a review of these requirements, the substance of a particular site plan or other statement required to accompany a special exception application is dependent on the particular use. Different uses are subject to distinct treatment. To the extent that these Requirements 1 and 2 above are distinct from any requirement applicable to other special exception uses, such drawing of distinct requirements is consistent with treatment of these other uses. Accordingly, the Court finds that the imposition of these two requirements does not represent any departure from practices generally applicable to Special Exceptions for other uses.

(4) All required parking spaces

shall be provided on-site, except as follows:

(A) The required number of parking spaces may be reduced on-site by one (1) space if on-street parking is allowed in front of the subject lot, or

(B) The required number of parking spaces may provided off-site if:

(i) the mini-dormitory is located within five hundred (500) feet of an existing parking lot;

(ii) the owner of the mini-dormitory has written permission from the parking lot owner for the residents of the mini-dormitory to use the parking lot; and

(iii) the existing parking lot has sufficient surplus parking spaces available to provide the number of spaces required.

Requirement 4 cannot be said to be distinct from the requirements

applicable to other residential parking requirements. Effectively, the Ordinance incorporates in more certain language the substance of § 27-573 of the Zoning Ordinance which governs "off-site parking lot[s]."

E. RELATIONSHIP TO REQUIREMENTS TO STATED PURPOSES

1. The first area of "discriminatory" treatment of mini-dormitories is the requirement that "rooms used for sleeping purposes shall have not less than seventy (70) square feet per resident." It cannot be said that this requirement is not rationally related to the purpose set forth in § 27-249.1 as added by the Ordinance: "to prevent or control detrimental effects upon neighboring properties, such as illegal parking and saturation of

available parking by residents of mini-dormitories, litter and noise." Similarly, it cannot be said that this requirement does not rationally relate to the purpose expressed in §§ 27-374.1(a)(7), 27-445.7(a)(6), 27-532.2(a)(6) and 27-548.1.2(6) that the "use shall not alter the single-family residential character for appearance of the premises." The imposition of a requirement that there be minimal space for sleeping operates to control the number of occupants of structures designed for one-family, two-family, and three-family occupancy, thus minimizing or controlling the availability of parking to assure that there is sufficient parking. Additionally, such requirement assures that the "residential character" of the premises

is not altered.

Is attainment of these purposes by imposition of the sleeping area requirement irrational in juxtaposition to requirements applicable to one-family, two-family and three-family dwellings by virtue of the limitations found throughout Part 5 of the Zoning Ordinance? This Court cannot state that it is. Therefore, deference is mandated to the legislative judgment of the District Council **and this Court finds that this requirement is rationally related to the stated purposes of the Ordinance.**

2. Is the requirement that "parking spaces provided solely for, and on the same lot with, the mini-dormitory may be located one behind the other (the front space may be used as access to the rear

space)," rationally related to the stated purposes of the Ordinance? This requirement is clearly a legitimate means of attaining the stated purpose "to prevent or control detrimental effects upon neighboring properties, such as illegal parking and saturation of available parking by residents of mini-dormitories." Insofar as it may be suggested that this requirement is distinct from that for one-family, two-family and three-family dwellings that do not constitute a mini-dormitory, such distinction cannot be said to be irrational. Therefore, deference must be given to the exercise of legislative judgment by the District Council **and the Court finds that this requirement is rationally related to the stated purposes of the Ordinance.**

3. Is the requirement that "the number of driveway entrances authorized shall not exceed one (1) driveway entrance per lot or per street on which the subject lot has frontage (i.e., a corner lot), unless such driveway entrances were in existence on November 28, 1989" rationally related to the stated purposes of the mini-dormitories? This requirement is clearly rationally related to the stated purpose to "prevent or control detrimental effects upon neighboring properties, such as illegal parking and saturation of available parking by residents of mini-dormitories." To the extent that it may be distinct from any other requirement imposed upon one-family, two-family, or three-family dwellings that do not meet the definition of a mini-dormitory, such

distinction cannot be said to be irrational. Therefore, deference must be given to the legislative judgment of the District Council **and the Court finds that this requirement is rationally related to the stated purposes of the Ordinance.**

4. Is the requirement that "the maximum percentage of lot coverage may only be increased by the District Council in the form of a variance granted in connection with the approval of a special exception" rationally related to achievement of the stated purposes of the Ordinance? This requirement is clearly a rational means of seeking to attain the purpose that the "use shall not alter the single-family residential character or appearance of the premises." It would

appear to be distinct from requirements imposed upon one-family, two-family and three-family dwellings that do not come within the definition of a mini-dormitory in that the District Council has reserved to itself the grant of a variance. With regard to the grant of a variance, the applicant still must make the request. The request must be made to the District Council as opposed to the Board of Zoning Appeals. However, the owner of a one-family, two-family or three-family dwelling that is not a mini-dormitory may seek a variance without the necessity for filing a Special Exception. There is no more effective means of preventing or controlling "detrimental effects upon . . . properties" than that control exercised by the review that comes as

part of the process for the grant of a Special Exception. What uses are to be permitted by Special Exception, as opposed to routinely, is a question left to the judgment of the legislature. Insofar as the wisdom of such a requirement may be deemed debatable, this Court must bow to the legislative judgment of the District Council. It cannot say that this requirement is irrationally related to achievement of the purposes of the Ordinance. The Court finds that this requirement is rationally related to the stated purposes of the Ordinance.

F. APPLICABILITY OF CLEBURNE

The Court is of the opinion that the foregoing discussion and examination of the Ordinance is consistent with Cleburne v. Cleburne Living Center,

supra. There, the federal trial court had before it an ample and complete record of the facts which served as the basis for the denial of a "special permit" (analogous to a Special Exception under the County's Zoning Ordinance) for the operation of a facility for the mentally retarded. The Court was not called upon to examine "imagined" irrational bases for discriminatory treatment of the facility in question. The consideration was within the context of an actual application for a special permit and the actions and statements made by the relevant authority in denying issuance of the permit.

In this matter, this Court has been asked to accept "imagined" irrational bases for anticipated difficulties in

satisfying the requirements of the Ordinance. There is nothing in the record before this Court which permits invalidation of the Ordinance on the basis of anticipated action. Significantly, one cannot ignore the fact that the Supreme Court in Cleburne did not invalidate the challenged ordinance. It merely invalidated the actual action of the City on a special use permit application which presented a well-defined case and controversy to the Court. **The Supreme Court does not suggest that an ordinance that looks like that challenged in Cleburne is unconstitutional or invalid on its face.**[11] Closely examined, the Supreme

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11. Contrary to Plaintiffs' argument, the Supreme Court rejected the Court of Appeals for the Fifth Circuit's

Court can be said to have deferred to the legislative judgment of the City of Cleburne in determining that, as a category of use, group homes for the mentally retarded should be permitted only by a special use permit.

G. OTHER ASSERTED BASES FOR INVALIDITY

As identified on page 11 of the Opinion, the Plaintiffs have asserted certain other bases for invalidation of the Ordinance not yet discussed. Specifically, under Count 2 it is alleged that the Ordinance is unconstitutional inclusive," and

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determination that the challenged ordinance was invalid on its face. The Court upheld the lower court's determination only insofar as the ordinance was invalid as applied to the instance giving rise to the controversy before the Court, Cleburne 473 US at 450, 105 S.Ct. 3249.

"vague."

The Court perceives a certain inconsistency in the assertion that the Ordinance is both "under-inclusive" and "over-inclusive." Since the Court deems greater merit in the "under-inclusive" assertion, it will be addressed.

Legislation is unconstitutionally under-inclusive when it treats similarly situated groups differently to such an extent that the legislative classifications are revealed to be "clearly wrong, a display of arbitrary power, [and] not an exercise of judgment." Matthews v. DeCastro, 429 US 181, 185 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). In theory, gross under-inclusion negates the proposition that the legislature was concerned with achieving the stated legislative goal,

and supports an inference that the legislation was aimed at harming a politically unpopular group.

The Supreme Court, however, has been extremely reluctant to invalidate legislation as unconstitutionally under-inclusive, and has gone to great lengths to express deference for the political process. In Williamson v. Lee Optical of Oklahoma, 348 US 843, 489, 75 S.Ct. 641, (1955), the Supreme Court discussed why the judiciary must be tolerant of most under-inclusive legislation:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the

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> legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. (Citations omitted.)

At oral argument, Plaintiffs suggested that since other groups, such as judges, which "tend to congregate" and contribute to parking congestion are not subject to the Ordinance, the Ordinance should be struck as clearly arbitrary. For all the record shows, however, the problems posed by judges (and other groups) may not be "acute to the legislative mind," or perhaps the legislature is merely making reform "one step at a time." Even assuming that the Ordinance is under-inclusive, it is not this Court's role to invalidate piecemeal legislation absent a showing

of invidious discrimination. Because this Court finds no evidence of invidious discrimination, Plaintiffs' contention that the statute is unconstitutionally under-inclusive must fail.

The Court declines to discuss the assertion that the Ordinance is "over-inclusive." In light of the above discussion wherein this Court has determined that there is no evidence of invidious discrimination, Plaintiffs' contention that the Ordinance is "over-inclusive" must fail.

It is asserted that the Ordinance is unconstitutionally vague in two areas. First, it is asserted that the terms "full or part-time student" and "institution of higher learning" are undefined. Second, it is asserted that

the Ordinance "lacks the necessary standards to guide the landlord in following [its] requirements."

In reference to the first asserted basis for vagueness, the Court finds that the terms "full or part-time student" and "institution of higher learning" are not unconstitutionally vague. In reference to the second asserted basis for vagueness, the Ordinance is not lacking in any standard necessary to guide a property owner in following its requirements.

III. CONCLUSION

In summary, the Court finds and declares as follows:

1. The purposes of CB-152-1989 are set forth in its title, and §§ 27-249.1(b) and 27-445.7(a)(6) of the Prince George's County Zoning Ordinance

as amended by CB-152-1989.

2. The purposes of CB-152-1989, are legitimate ends for the exercise of the police powers of the Prince George's County, sitting as the District Council.

3. CB-152-1989's treatment of students, distinctive from non-students, does not violate the County's Human Relations Act.

4. The provisions of CB-152-1989 treat students differently from non-students with respect to use of land as a mini-dormatory in several regards all of which are rationally related to the stated purpose of the Ordinance.

5. CB-152-1989 does not unconstitutionally infringe on any right of association of any of the Plaintiffs.

6. CB-152-1989 does not unconstitutionally infringe on any right

of privacy of any of the Plaintiffs.

7. CB-152-1989 does not violate the Fifth Amendment prohibition against the taking of any of the Plaintiffs' property without due process of law or without just compensation.

8. CB-152-1989 is not unconstitutionally under-inclusive.

9. CB-152-1989 is not over-inclusive.

10. CB-152-989 is not unconstitutionally vague.

11. CB-152-1989 is not lacking in any standard necessary to guide an owner of property in following its requirements.

12. CB-152-1989 does not violate the rights of the Plaintiffs under the Equal Protection Clause of the Fourteenth Amendment of the United

States Constitution.

13. CB-152-1989 is a valid and constitutional exercise of the police powers of Prince George's County, Maryland.

ACCORDINGLY, the Court grants judgment to the Defendant on all five counts of the Complaint for Declaratory Relief. Costs are to be paid by the Plaintiffs as assessed by the Clerk of the Court.

/original signed/
LARNZELL MARTIN, JR.
Associate Judge
Seventh Judicial Circuit

Dated: /original dated 1 August, 1991/

Copies mailed by the Court to:

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Attorney for Plaintiff
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Crystal R. Dixon, Esquire, Associate
County Attorney Office of Law, Room
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Upper Marlboro, MD 20772

/original signed/
Judy Yochelson, Administrative Aide
August 1, 1991

Sec. 27-441. Uses permitted.

(b) TABLE OF USES

USE	ZONE														
	O-S	R-A	R-E	R-R	R-80	R-55	R-35	R-20	R-T	R-30	R-18	R-18C	R-10A	R-10	R-H
(6) RESIDENTIAL/LODGING:															
*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	
Guest House, as an accessory use	P	P													
Mini-dormitory:															
(A) In accordance with Section 27-455.7	P	P	P	P	P	P	P	P	P	P	P	P		P	P
(B) All others	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE		SE	SE
*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	

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DR-3

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND

SITTING AS THE DISTRICT COUNCIL

Legislative Session 1989

Bill No. CB-152-1989

Chapter No. _____

Proposed and Presented by Council Member Herl

Introduced by Council Members Herl and Bell

Co-Sponsors _____

Date of Introduction October 31, 1989

ZONING BILL

AN ORDINANCE concerning

Mini-Dormitories

For the purpose of defining a mini-dormitory; establishing criteria for regulating this use; allowing it as a permitted use or by Special Exception in certain zones, subject to certain

criteria; prohibiting the Board of Appeals from granting certain variances for mini-dormitories; prohibiting the Planning Board from approving departures from the required number of parking spaces for mini-dormitories; and requiring all existing uses to be in conformance with these regulations by July 1, 1991.

BY repealing and reenacting with amendments:

Sections 27-107.1,
27-229(b),
27-441(b)(6),
27-515(b)(7),
27-547(b)(7),
27-568, and
27-588(c),

By adding:

Sections 27-249.1,

27-374.1,
27-445.7,
27-532.2, and
27-548.1.2,

The Zoning Ordinance of Prince George's County, Maryland,

being also

SUBTITLE 27. ZONING.

The Prince George's County Code

(1987 Edition, as amended by CB-23-1988, CB-38-1988, CB-39-1988, CB-61-1988, CB-16-1989, CB-34-1989, CB-35-1989, and CB-86-1989).

SECTION 1. BE IT ENACTED by the County Council of Prince George's County, Maryland, sitting as the District Council for that part of the Maryland-Washington Regional District in

Prince George's County, Maryland, that Section/s 27-107.1, 27-229(b), 27-441(b)(6), 27-515(b)(7), 27-547(b)(7), 27-568, and 27-588(c) of the Zoning Ordinance of Prince George's County, Maryland, being also Subtitle 27 of the Prince George's County Code, be and the same are hereby repealed and reenacted with the following amendments:

SUBTITLE 27. ZONING.

PART 2. GENERAL.

DIVISION 1. DEFINTIONS.

Sec. 27-107.1. Definitions.

(a) Terms in the Zoning Ordinance are defined as follows:

* * * * * *

(150.1) Mini-Dormitory: An off-campus residence, located in a building that is, or was originally constructed as a one-family, two-family,

or three-family dwelling which houses at least three (3), but nore more than five (5), individuals, all or part of whom are unrelated to one another by blood, adoption, or marriage and who are registered full-time or part-time students at an institution of higher learning.

* * * * * * *

PART 3. ADMINISTRATION.

DIVISION 5. APPEALS AND VARIANCES

Subdivision 1. Board of Zoning Appeals.

Sec. 27-229. Powers and duties.

(b) The Board of Zoning Appeals shall not have the power or duty to:

* * * * * * *

(25) Grant a variance within a Recreational Comunity Development, unless for the sole purpose of making a home improvement[.] ;

(26) Grant a variance from the provisions of Sections 27-249.1, 27-374.1, 27-445.7, 27-532.2, and 27-548.1.2 concerning mini-dormitories.

PART 5. RESIDENTIAL ZONES.

DIVISION 3. USES PERMITTED.

PART 8. COMPREHENSIVE DESIGN ZONES.

DIVISION 3. USES PERMITTED.

Sec. 27-515. Uses permitted.

(b) TABLES OF USES

	ZONE					
USE	M-A-C	L-A-C	E-I-A	R-U	R-M	R-S
(7) RESIDENTIAL/LODGING:						
*	*	*		*		
Hotel	P		P[11]			
Mini-dormitory:						
(A) In Accordance with Section 27-532.2	P	P		P	P	P
(B) All others	SE	SE		SE	SE	SE
*	*	*		*		

PART 10. MIXED USE ZONES.

DIVISION 3. USES PERMITTED.

Sec. 27-547. Uses permitted.

(b) TABLE OF USES

USE	ZONE M-X-T
(7) RESIDENTIAL/LODGING:	
* * * * * *	
Hotel or Motel	P
Mini-dormitory:	
(A) In accordance with Section 27-548.1.2	P
(B) All others	SE

PART 11. OFF-STREET PARKING AND LOADING

DIVISION 2. PARKING FACILITIES

Subdivision 3. Minimum Requirements.

Sec. 27-568. Schedule (number) of spaces required, generally.

(a) In all zones (except the M-X-T Zone), the minimum number of

required off-street parking spaces for each type of use shall be as listed in the following shedule. In the schedule, each "employee" means each emplee on the largest shift.

Type of Use	Number of Spaces	Unit of Measurement
(1) RESIDENTIAL:		
*	*	* *
Group residential facility	1.0	4 residents
Mini-dormitory	1.0	Each resident
*	*	* *

DIVISION 4. EXCLUSIONS, WAIVERS, AND DEPARTURES.

Sec. 27-588. Departures from number of parking and loading spaces required.

(c) [Facilities for the handicapped] Departures not permitted

(1) A departure from the number of spaces required for the physically

handicapped (Section 27-566) shall not be granted unless an exception from the requirements for the handicapped in applicable building codes has been obtained from the State and County agencies responsible for administering those codes. If the exception is granted, this Section may be applied to Section 27-566.

(2) A departure from the number of spaces required for a mini-dormitory may not be approved by the Planning Board. A reduction in the required number of spaces may only be permitted by the District Council, in the the form of a variance granted in connection with the approval of a Special Exception.

SECTION 2. BE IT FURTHER ENACTED that new Sections 27-249.1, 27-374.1, 27-445.7, 27-532.2, and 27-

548.1.2 be and the same are hereby added to the Zoning Ordinance of Prince George's County, Maryland, being also Subtitle 27 of the Prince George's County Code, as follows:

SUBTITLE 27. ZONING.

PART 3. ADMINISTRATION.

DIVISION 6. NONCONFORMING BUILDINGS, STRUCTURES, AND USES.

Subdivision 2. Additional Requirements for Specific Nonconforming Uses.

Sec. 27-249.1. Mini-dormitories.

(a) In addition to being certified, a nonconforming mini-dormitory may only continue subject to the requirements of this Section and to any other applicable requirements of this Division.

(b) The purpose of this

Section is to prevent or control detrimental effects upon neighboring properties, such as illegal parking and saturation of available parking by residents of mini-dormitories, litter, and noise.

(c) All certified nonconforming mini-dormitories shall meet the following requirements:

(1) The use shall not alter the single-family residential character or appearance of the premises; and

(2) The property shall be maintained in accordance with all applicable provisions of the County Code.

(d) In order to provide for a reasonable standard of amortization and to prevent an unreasonable loss, all certified nonconforming mini-dormitories may continue in operation until July 1,

1991, in accordance with the provisions of this Subtitle. On or after that date, a mini-dormitory may only continue in operation upon the issuance of a use and occupancy permit in accordance with the standards set forth in Section 27-445.7 or if a Special Exception for a mini-dormitory has been approved in accordance with Part 4 of this Subtitle.

PART 4. SPECIAL EXCEPTIONS.

DIVISION3. ADDITIONAL REQUIREMENTS FOR SPECIFIC SPECIAL EXCEPTIONS.

Sec. 27-374.1 Mini-dormitory.

(a) A mini-dormitory may be permitted, subject to the following:

(1) The application shall be accompanied by a statement which sets forth an acceptable maintenance plan;

APPEAL

(2) The site plan shall include the number, type, and location of exterior trash receptacles;

(3) Rooms used for sleeping purposes shall have not less than seventy (70) square feet per resident;

(4) All required parking spaces shall be provided on-site, except as follows:

(A) The required number of parking spaces may be reduced on-site by one (1) space if on-street parking is allowed in front of the subject lot; or

(B) The required number of parking spaces may be provided off-site if:

(i) The mini-dormitory is located within five hundred (500) feet of an existing parking lot;

(ii) The owner of the mini-dormitory has written permission from the parking lot owner for the residents

of the mini-dormitory to use the parking lot; and

(iii) The existing parking lot has sufficient surplus parking spaces available to provide the number of spaces required;

(5) Parking spaces provided solely for, and on the same lot with, the mini-dormitory may be located one behind the other (the front space may be used as access to the rear space);

(6) The number of driveway entrances authorized shall not exceed one (1) driveway entrance per building lot or per street on which the subject lot has frontage (i.e., a corner lot), unless such driveway entrances were in existence on November 28, 1989;

(7) The use shall not alter the single-family residential character or

appearance of the premises;

(8) The maximum percentage of lot coverage for a mini-dormitory shall be the same as that for the dwelling type that was originally constructed on the lot; and

(9) The maximum percentage of lot coverage may only be increased by the District Council in the form of a variance granted in connection with the approval of a Special Exception.

PART 5. RESIDENTIAL ZONES.

DIVISION 5. ADDITIONAL REQUIREMENTS FOR SPECIFIC USES.

Sec. 27-445.7. Mini-dormitories.

(a) A mini-dormitory permitted (P) in the Table of Uses shall be subject to the following:

(1) The property shall be maintained in accordance with all applicable

provisions of the County Code;

(2) Rooms used for sleeping purposes shall have not less than seventy (70) square feet per resident;

(3) All parking spaces shall be provided on-site, in accordance with Part 11;

(4) Parking spaces provided solely for, and on the same lot with, the mini-dormitory may be located one behind the other (the front space may be used as access to the rear space);

(5) The number of driveway entrances authorized shall not exceed one (1) driveway entrance per lot or per street on which the subject lot has frontage (i.e., a corner lot), unless such driveway entrances were in existence on November 28, 1989;

(6) The use shall not alter the single-

family residential character or appearance of the premises;

(7) The maximum percentage of lot coverage for a mini-dormitory shall be the same as that for the dwelling type that was originally constructed on the lot; and

(8) The maximum percentage of lot coverage may only be increased by the District Council in the form of a variance granted in connection with the approval of a Special Exception.

PART 8. COMPREHENSIVE DESIGN ZONES.

DIVISION 5. ADDITIONAL REQUIREMENTS FOR SPECIFIC USES.

Sec. 27-532.2. Mini-dormitories.

(a) A mini-dormitory permitted (P) in the Table of Uses shall be subject to the following:

(1) The property shall be maintained in accordance with all applicable provisions of the County Code.

(2) Rooms used for sleeping purposes shall have not less than seventy (70) square feet per resident;

(3) All parking spaces shall be provided on-site, in accordance with Part 11;

(4) Parking spaces provided solely for, and on the same lot with, the mini-dormitory may be located one behind the other (the front space may be used as access to the rear space);

(5) The number of driveway entrances authorized shall not exceed one (1) driveway entrance per lot or per street on which the subject lot has frontage (i.e., a corner lot), unless such driveway entrances were in existence on

November 28, 1989;

(6) The use shall not alter the single-family residential character or appearance of the premises;

(7) The maximum percentage of lot coverage for a mini-dormitory shall be the same as that for the dwelling type that was originally constructed on the lot; and

(8) The maximum percentage of lot coverage may only be increased by the District Council in the form of a variance granted in connection with the approval of a Special Exception.

PART 10. MIXED USE ZONES.

DIVISION 5. ADDITIONAL REQUIREMENTS FOR SPECIFIC USES.

Sec. 27-548.1.2. Mini-dormitories.

(a) A mini-dormitory permitted (P) in the Table of Uses shall

be subject to the following:

(1) The property shall be maintained in accordance with all applicable provisions of the County Code;

(2) Rooms used for sleeping purposes shall have not less than seventy (70) square feet per resident;

(3) All parking spaces shall be provided on-site, in accordance with Part 11,

(4) Parking spaces provided solely for, and on the same lot with, the mini-dormitory may be located one behind the other (the front space may be used as access to the rear space);

(5) The number of driveway entrances authorized shall not exceed one (1) driveway entrance per lot or per street on which the subject lot has frontage (i.e., a corner lot), unless such

driveway entrances were in existence on November 28, 1989;

(6) The use shall not alter the single-family residential character or appearance of the premises;

(7) The maximum percentage of lot coverage for a mini-dormitory shall be the same as that for the dwelling type that was originally constructed on the lot; and

(8) The maximum percentage of lot coverage may only be increased by the District Council in the form of a variance granted in connection with the approval of a Special Exception.

SECTION 3. BE IT FURTHER ENACTED that this Ordinance shall take effect on July 1, 1990.

Adopted this _____ day of _____, 1989.

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COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND, SITTING AS THE DISTRICT COUNCIL FOR THAT PART OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT IN PRINCE GEORGE'S COUNTY, MARYLAND

BY: _____
JoAnn T. Bell
Chairwoman

ATTEST:

_____
Jean M. Schmuhl, CMC
Clerk of the Council

KEY:

Underscoring indicates language added to existing law.
[Brackets] indicate language deleted from existing law.
Asterisks *** indicate intervening existing Code provisions that remain unchanged.

APPROVED

FILED
NOV 8 1993
OFFICE OF THE CLERK

(2)

No. 93-490

In The

Supreme Court of the United States

October Term, 1993

PRINCE GEORGE'S COUNTY, MARYLAND,

Petitioner,

vs.

DONALD KIRSCH, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals of Maryland based its decision in *Kirsch v. Prince George's County,* 331 Md. 89, 626 A.2d 372, 380-81 (1993) on independent and adequate state grounds where it plainly stated its decision was based on the Maryland Declaration of Rights?

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No. 93-490

In The

Supreme Court of the United States

October Term, 1993

PRINCE GEORGE'S COUNTY, MARYLAND,

Petitioner,

vs.

DONALD KIRSCH, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

RESPONDENTS' BRIEF IN OPPOSITION

COUNTER STATEMENT OF THE CASE

On November 28, 1989, the Prince George's County Council enacted Zoning Ordinance Bill Number CB-152-1989 ("the Ordinance") to regulate and restrict housing for students in otherwise residential areas of the County. This ordinance regulates the use of one, two, or three-family dwellings which are occupied by "at least three (3), but not more than five (5) individuals, all or part of whom are unrelated to one another by blood, adoption, or marriage and who are registered full-time or part-time students at an institute of higher learning." *See* Code of

Prince George's County § 27-107.1.(A) (150.1). (Pet. App. 5a-6a). The Ordinance does not apply at all to housing not occupied by students.

The ordinance establishes several restrictive, and indeed punitive, criteria for the use of these "mini-dormitories," including the requirement that rooms used for sleeping purposes be at least 70 square feet per resident, that there be one parking space per occupant, that all parking spaces be provided on site, that the number of driveway entrances be limited to one entrance per lot, and homeowners must obtain a permit "certifying" the home as a "mini-dormitory." The Maryland Court of Appeals recognized, in its majority decision, that the "burden of complying with the arduous requirements of the ordinance" impacted solely on students based upon their occupation outside the home. *Kirsch v. Prince George's County*, 331 Md. 89, 626 A.2d 372, 381 (1993).

Respondents include potential lessors and students who would be adversely affected by the Ordinance. On July 3, 1990, Respondents filed ~~a complaint for~~ declaratory relief in the Circuit Court for Prince George's County in order to have the Ordinance declared invalid. Respondents moved for an interlocutory injunction in the Circuit Court on February 14, 1993. The motion was granted and cross motions for summary judgment were filed.

Although summary judgment was granted in favor of Prince George's County on August 1, 1991, and affirmed by the Court of Special Appeals of Maryland on July 8, 1992, the Court of Appeals of Maryland reversed, holding that Respondents were denied equal protection under Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment of the United States Constitution. The Court of Appeals of Maryland held that the Ordinance, which discriminated based upon one's occupation outside the home, was "wholly unrelated to the stated purpose of the ordinance," which was to "address complaints regarding noise, litter and parking

problems from residents of the College Park area." *Kirsch v. Prince George's County,* 331 Md. 89, 626 A.2d 372, 380-81 (1993).

Respondents alleged in their complaint that the Ordinance violated their constitutional rights under Article 24 of the Maryland Declaration of Rights; they also argued that the Ordinance violated the Maryland Declaration of Rights in their Motion for Summary Judgment and Memorandum of Points and Authorities, and before both the Court of Special Appeals of Maryland and the Court of Appeals of Maryland. Both Maryland appellate courts addressed Article 24 of the Maryland Declaration of Rights in their respective opinions.

Respondents thus disagree with Petitioner's cursory and selective analysis of the application and treatment of Article 24 of the Maryland Declaration of Rights by the Court of Appeals of Maryland in Petitioner's Statement of the Case. Given the importance of the application of Maryland's constitution by Maryland's highest court, Respondents will address this important issue in the Argument section of their Reasons for Denying the Petition for Writ of Certiorari. It could not be more clear that the Court of Appeals distinctly decided this case on independent state grounds.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

There are three reasons to deny the Petition for Writ of Certiorari. First, the Court of Appeals of Maryland explicitly decided *Kirsch v. Prince George's County,* 331 Md. 89, 626 A.2d 372 (1993) on independent and adequate state grounds. Second, the holding is in accord with federal constitutional law under the equal protection clause of the Fourteenth Amendment of the United States Constitution. Finally, this state court holding

concerning a county ordinance is not a "serious question of national importance" which threatens to deprive the states of their authority to govern, as suggested and grossly over-stated by Petitioner. (Pet. at 30).

I.

THE COURT OF APPEALS OF MARYLAND DECIDED THIS CASE ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

A. Supreme Court Jurisdiction in State Law Cases.

This Court clarified its jurisdiction to review state court decisions based on state law in *Michigan v. Long*, 463 U.S. 1032 (1983). Citing the dual policies of (1) respect for the independence of state courts, and (2) avoidance of advisory opinions,[1] the Supreme Court reaffirmed its refusal to review state court decisions "where their is an independent and adequate state ground." *Long*, 463 U.S. at 1040.[2]

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1. Justices and commentators alike have cited large and unmanageable Supreme Court dockets and the nature of our federal system as reasons for declining review of state decisions. *See Ponte v. Real*, 471 U.S. 491, 523 (1985) (Marshall, J., dissenting); John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 179 (1982) ("[W]e grant many more cases than we should, thereby making our management problem even more unmanageable."); *Developments — State Constitutions*, 95 Harv. L. Rev. 1324, 1344 (1982) ("If . . . the rights of the people are to continue to enjoy the full measure of the 'double security' afforded by the federalist division, the federal court must exercise special caution before undercutting state protections of rights.")

2. Since *Long*, the review of several state court decisions have been denied by the Supreme Court. *See, e.g., Sochor v. Florida*, 504 U.S. __, 119 L. Ed. 2d 326, 337-338 (1992) (Court lacked jurisdiction to review claim that judge's instruction was unconstitutional, because Florida Supreme Court based its decision on independent and adequate state grounds); *Colorado v. Nunez*, 465

(Cont'd)

Further elucidating the issue, Justice O'Connor delivered the following statement of the Supreme Court:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

Long, 463 U.S. at 1040-41. Therefore, in order to review a state court decision, two factors must be present. First, the state court decision must either (a) fairly appear to rest primarily on federal law, or (b) be interwoven with the federal law. Second, the adequacy and independence of any possible state law ground must not be clear from the face of the opinion. Even if these two factors arise, the state court may insulate its decision from review with a

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(Cont'd)

U.S. 324 (1984) (writ was improvidently granted on search and seizure issue because the Colorado Supreme Court based its decision on independent and adequate state grounds); *Uhler v. A.F.L.-C.I.O.*, 468 U.S. 1310, 1311 (1984) (Rehnquist, C.J., sitting as circuit justice) (California Supreme Court's analysis of Article V of the United States Constitution would have been reviewable if the California court did not *also* base its decision on independent and adequate state law grounds).

"plain statement" that federal precedents supply only persuasive authority.

In the instant case, the independence and adequacy of the state law basis is clear from the face of the opinion. Furthermore, the Court of Appeals of Maryland made a plain statement that the Supreme Court authority is merely persuasive.

B. The Plain Statement

The Court of Appeals of Maryland began its opinion by citing the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article 24 of Maryland's Declaration of Rights. Maryland's highest court stressed that "equal protection is implicitly guaranteed by the due process provision found in Article 24 of the Declaration of Rights." *Kirsch*, 626 A.2d at 375 (citing twelve different Maryland cases for support: *Murphy v. Edmonds*, 325 Md. 342, 353, 601 A.2d 102, 107 (1992); *Hargrove v. Board of Trustees*, 310 Md. 406, 416, 529 A.2d 1372, 1377 (1987); *cert. denied*, 484 U.S. 1027, 108 S. Ct. 753, 98 L. Ed. 2d 766 (1988); *United Wire v. State Deposit Ins. Fund*, 307 Md. 148, 157, 512 A.2d 1047, 1052 (1986); *Ennis v. State*, 306 Md. 579, 591, 510 A. 2d 573, 579 (1986); *State v. Wyand*, 304 Md. 721, 726, 501 A.2d 43, 46 (1985); *cert. denied*, 475 U.S. 1095, 106 S. Ct. 1492, 89 L. Ed. 2d 893 (1986); *Loveday v. State*, 296 Md. 226, 241, 462 A.2d 58, 65 (1983); *Hornbeck v. Somerset Co. Bd. of Educ.*, 295 Md. 597, 640, 458 A.2d 758, 768, 780-81 (1983); *Lawrence v. State*, 295 Md. 557, 559-60, 457 A.2d 1127, 1128 (1983); *Attorney General v. Waldron*, 289 Md. 683, 704-05, 426 A.2d 929, 940-41 (1981); *Board of Supervisors of Elections v. Goodsell*, 284 Md. 279, 293 n. 7, 396 A.2d 1033, 1044 n. 7 (1978); *Governor v. Exxon Corp.*, 279 Md. 410, 438 n. 8, 370 A.2d 1102, 1118 n. 8 (1977), *aff'd*, 437 U.S. 117, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978); *Bruce v. Director, Chesapeake Bay Affairs*, 261 Md. 585, 600, 276 A.2d 200, 208 (1971)).

The *Kirsch* court then *plainly stated* that the Fourteenth Amendment and Article 24 are "*independent* of one another, and a violation of one is not necessarily a violation of the other. *See Hornbeck . . . ; Waldron . . . .*" *Id.* at 376 (emphasis added). In so ruling, the Court of Appeals of Maryland cited two important Maryland cases: (1) *Hornbeck v. Somerset Co. Bd. of Educ.*, 295 Md. 597, 640, 458 A.2d 758, 781 (1983), and (2) *Attorney General v. Waldron*, 289 Md. 683, 704-05, 426 A.2d 929, 941.

On the page cited to in *Hornbeck*, the Court of Appeals of Maryland held that "decisions of the Supreme Court interpreting the equal protection clause of the federal constitution are *persuasive authority* in cases involving the equal treatment provisions of Article 24." *Hornbeck*, 295 Md. at 640, 458 A.2d at 781. In the cited case *Waldron*, the Court of Appeals explained that "the application of Article 24 of the Maryland Declaration of Rights may require a result *at variance* with the Supreme Court's application of the fourteenth amendment's equal protection clause." *Waldron*, 289 Md. 683, 426 A.2d at 946 n. 20 (emphasis added). The *Waldron* court then adopted the language of the North Dakota Supreme Court:

> While some of our decisions would pass muster under the . . . "traditional" equal protection analysis, it may be that some of our statutes which we have declared unconstitutional might have passed the Federal constitutional screening. Such results are to be expected under a dual constitutional system. The Federal courts examine State statutes only to determine if they comply with the United States Constitutional mandates . . . ; we examine them for the that purpose and also to determine if they comply with State Constitutional mandates . . . . No one should be

> surprised if a statute passes the one set of standards and not the other.

Id. (citing *Johnson v. Hassett*, 217 N.W. 2d 771, 775-76 (N.D. 1974). The Maryland Court of Appeals has lucidly stated that its interpretation of its own constitution may, quite naturally, differ from this Court's interpretation of the Federal Constitution. The Maryland Court thus also restated the commonly accepted maxim that protection of individual rights under the State Constitution may exceed the protection afforded by the Federal Constitution. *See e.g., Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 82-88 (1980).

Therefore, by *plainly asserting* that Article 24 is independent of the Fourteenth Amendment and that "a violation of one is not necessarily a violation of another," the Court of Appeals of Maryland plainly established that (1) United States Supreme Court cases are merely persuasive authority in interpreting Article 24, and, (2) although a case may not violate the Fourteenth Amendment, it may nonetheless violate Article 24. Given this plain statement, the decision of Maryland's highest court should not be disturbed.

C. Independent and Adequate State Grounds.

In addition to this "plain statement," the independence and adequacy of the state grounds for the decision by the Court of Appeals of Maryland is clear from the face of the opinion.

First, the Court of Appeals of Maryland expressly cites the Maryland case of *Murphy v. Edmunds*, 325 Md. 342, 355-357, 601 A.2d at 108-09 for an enunciation of *Maryland's* equal protection analysis. The Court of Appeals of Maryland *fails to cite a single Supreme Court case* for the *Supreme Court's* enunciation of the rational basis test. *See* 626 A.2d at 376.

Second, *immediately* before the Court overturned the Ordinance because it is an irrational classification "based solely on occupation," *Kirsch,* 626 A.2d 380, the Court cited the holdings of *six Maryland cases* where the Court of Appeals of Maryland has invalidated "classifications in statutes regulating the pursuit of occupations where those classifications lacked a rational relation to a legitimate governmental purpose." *Kirsch,* 626 A.2d at 379-80.[3]

Although well before beginning its analysis of the Ordinance, the Court of Appeals of Maryland listed the holdings of several Supreme Court cases, *none* of these Supreme Court cases addressed statutory classifications based on *occupation.* One case dealt with classifications based on mental health, while the others dealt with classifications based on residency. These Supreme Court cases were simply addressed to support the proposition that the Supreme Court has in the past invalidated legislative classifications under rational basis scrutiny. *Kirsch,* 626 A.2d at 376. Thus, as adduced above, the Supreme Court precedents were merely persuasive authority in interpreting Article 24 of the Maryland Declaration of Rights.

Therefore, (1) the statement of the independent status of Article 24 of the Maryland Declaration of Rights, (2) the express citation to *Murphy v. Edmunds,* 325 Md. 342, 601 A.2d 102 (1992) for an enunciation of the rational-basis test under Article 24 of the Maryland Declaration of Rights, and (3) the reference to six Maryland cases (and no Supreme Court cases) which hold that

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3. These cases were *Wheeler v. State,* 281 Md. 593, 606, 380 A.2d 1052, 1060 (1977); *Maryland State Bd. of Barber Examiners v. Kuhn,* 270 Md. 496, 312 A.2d 216 (1973); *Bruce v. Director, Chesapeake Bay Aff.,* 261 Md. 585, 276 A.2d 200 (1971); *Schneider v. Duer,* 170 Md. 326, 184 A. 914 (1936); *Dasch v. Jackson,* 170 Md. 251, 183 A. 534 (1936); *Havre de Grace v. Johnson,* 143 Md. 601, 123 A. 65 (1923).

classifications regulating the pursuit of occupations that bear no rational relation to a legitimate government objective will be invalidated, plainly indicate that the Court of Appeals of Maryland relied on "independent" state grounds for its decision. The state law is also "adequate" since the Court of Appeals of Maryland relied on substantial state law concerning classifications based on occupation to conclude that the Ordinance violates *its* state rational basis test. Finally, it must not be ignored that the Court of Appeals explicitly held that the ordinance at issue violated the Maryland constitution.

II.

THE COURT OF APPEALS OF MARYLAND'S CITATION OF FEDERAL LAW AS PERSUASIVE AUTHORITY WAS CORRECT, AND, THEREFORE, SHOULD NOT BE REVIEWED.

Even assuming that the Court of Appeals' decision may be considered to rest on federal grounds, the writ should nevertheless be denied. The decision below is correct and is not in conflict with the decisions of any federal court of appeals or state court of last resort.

Equal protection analysis largely depends on "the circumstances of each case." *Griffin v. School Bd. of Prince Edward Cty.*, 377 U.S. 218, 230 (1964). In fulfilling its role as the highest court in the State of Maryland, the Court of Appeals of Maryland properly addressed federal precedents in analyzing the unique circumstances involving the Ordinance.

In *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985), the Supreme Court used rational basic analysis to invalidate a city ordinance which required a special use permit for particular group homes, such as homes occupied by the mentally

retarded. Special use permits were not required for "apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment houses, hospitals, sanitariums, nursing homes for convalescents or the aged . . . private clubs or fraternal orders, and other specified uses." *Id.* at 447. Although the mentally retarded were treated by the Court as "different," the "difference is largely irrelevant" unless a mentally retarded group home would threaten the city's legitimate interest in ways that the aforementioned group homes would not. Since there was no "rational basis" to make this conclusion, the Court invalidated the ordinance.

In the instant case, special regulations were imposed by Prince George's County for residences housing persons attending an "institution of higher education" on a full or part-time basis, in order to forward the interest of clearing residential neighborhoods of noise, litter, and parking congestion. As in *Cleburne,* the Ordinance contains no equivalent restrictions for boarding and lodging houses, fraternity or sorority houses, or other group residential facilities which are located within the same zone. In fact, a group of three to five unrelated young adults, senior citizens, or professionals could live together in a group house and would not be subject to the burdensome and restrictive requirements of the Ordinance; that is, until one of them attended an institute of higher learning on at least a part-time basis. As in *Cleburne,* and as recognized by the Maryland Court of Appeals, there is no "rational basis" to conclude that a person who occupies their time outside the home by attending an "institution of higher education," full-time or part-time, would threaten the county's objectives in any way that a person not attending an "institution of higher education" would threaten those objectives.

Although students may be unpopular, *Cleburne* made clear that "a bare . . . . desire to harm a politically unpopular group" is "not a legitimate state interest." *Id.* at 446-47. Such a desire is

particularly objectionable when the Supreme Court has called education "perhaps the most important function of state and local governments . . . . It is the very foundation of good citizenship." *Brown v. Board of Education,* 347 U.S. 483, 493 (1953). While in *Cleburne* the ordinance appeared "to rest on irrational prejudice against the mentally retarded," *Cleburne* at 450, this Ordinance appears to rest on irrational prejudice against students.[4]

Petitioner argues that the Court of Appeals of Maryland misinterpreted *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974) since Petitioner believes that "*Boraas* validates all rationally based zoning laws that promote the preservation of family oriented neighborhoods without using invidious discrimination." (Pet. at 18).

Boraas, however, was properly distinguished by the Court of Appeals of Maryland. In *Boraas,* the single family character of a zone was preserved by preventing those who did not fit the definition of "family" from living together, regardless of whether the occupants were attorneys, students, construction workers, fast food restaurant employees, etc.[5] The question in the instant case is not whether students occupying a home are a "family," but whether students are treated dissimilarly to others, who also happen not to be part of a family, based solely on *occupation* outside the home. As stated by the Court of Appeals:

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4. The Petitioner, who pontificates that it is a "simple reality that college students tend to create the type of disturbances that prevent a neighborhood from being a 'sanctuary,' " (Pet. at 16), should become acquainted with, *inter alia,* the Golden I.D. Student Association, "an organization of retired senior citizens who are registered full-time or part-time students at the University of Maryland College Park." (Court of Appeals of Maryland, Brief of Amici Curiae at 10).

5. Importantly, the *Boraas* statute *never* specified "students" in the legislation.

> Unlike the zoning ordinance analyzed in *Boraas,* the Prince George's County "mini-dorm" ordinance does not differentiate based on the nature of the use of the property, such as a fraternity house or a lodging house, but rather on the occupation of the persons who would dwell therein. Therefore, under the ordinance a landlord of a building originally constructed as a one, two or three family dwelling is permitted to rent the same for occupancy by three to five unrelated persons so long as they are not pursuing a higher education without incurring the burdens of complying with the arduous requirements of the ordinance. 26 A.2d at 381. (Pet. App. 41a-42a.)

Therefore, even if the dictate of *Boraas* was to "validate all rationally based zoning laws that promote the preservation of family oriented neighborhoods without using invidious discrimination," the Ordinance here is *not rationally based* because, as suggested by the Court of Appeals of Maryland, the Ordinance differentiates among non-family members based on "the occupation of the students who would dwell therein." *Kirsch,* 626 A.2d at 381. And, unlike *Boraas,* "[s]uch a zoning classification of residential property is wholly unrelated to the stated purpose of the ordinance." *Id.*

The distinction made by the Court of Appeals is valid and perfectly logical. If the argument made by the County were true as to the breadth of *Boraas,* then this Court could not have decided *Cleburne* in the manner that it did.[6]

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6. The Petitioner mentions, but fails to discuss the facts of *F.C.C. v. Beach Communications, Inc.*, 508 U.S. ___, 113 S. Ct. 2096 (1993). Petitioner's omission surely stems from the fact that *Beach* is wholly distinguishable. *Beach*

(Cont'd)

Thus, even if the Court of Appeals of Maryland relied on federal precedents to decide *Kirsch,* the Court properly applied those precedents to the unique circumstance involving the county ordinance at issue. As a result, the petition for writ or certiorari should be denied.

III.

THE ORDINANCE IS NOT A "SERIOUS QUESTION OF NATIONAL IMPORTANCE" WHICH THREATENS TO DEPRIVE THE STATES OF THEIR AUTHORITY TO GOVERN.

In petitioning this Honorable Court, Petitioner predicts both "dire effects," and a domino effect in other states as a result of the decision below. In so doing, Petitioner ignores the fact that the Court of Appeals of Maryland, as the highest court in the state, is better equipped than a federal court to address issues involving Maryland docket management and local Maryland ordinances due to the familiarity of the Court of Appeals of Maryland with those issues. And the Maryland Court of Appeals is certainly well-versed in Maryland zoning law and related issues. Zoning within particular Maryland counties is surely not a matter of national concern.

Local governments in Maryland, despite Petitioner's apocalyptic predictions, will continue to effectively zone their

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(Cont'd)
concerned no unpopular groups (Petitioner cannot seriously maintain that common owners of satellite master antenna television systems are a group of persons who faced hostility from the legislature and the community). Nor was there discrimination based on "occupation." Indeed, *Beach* concerned a purely economic regulation. This case, therefore, is most akin to *Cleburne,* and not *Beach,* which did not even discuss, and certainly did not purport to overrule the *Cleburne* decision. *Cleburne* remains binding authority.

territory and govern their citizens. Such governments must only be sure that legislative classifications do not deny its citizens equal protection under the law.

The Court of Appeals simply decided one case based on its unique set of facts that will have little effect, if any, on the passage of future legislation. The Court of Appeals has merely decided that Prince George's County, Maryland, cannot single out specific groups of persons, based on their student status or their occupation, for special burdens. This is a sensible and mandated result, and also one that is in conformity with the anti-discrimination statutes (including the Prince George's County Human Relations Act) of many jurisdictions, which prohibit discrimination based on occupational status.

Moreover, Petitioner's prediction that *Kirsch* will be "persuasive authority" in other jurisdictions is unfounded in terms of both practicality and history. As noted by this Court, equal protection analysis largely depends on "the circumstances of each case." *Griffin v. School Bd. of Prince Edward Cty.*, 377 U.S. 218, 230 (1964). Historically, Maryland cases involving equal protection analysis (especially when the decision, as this one, is based on the State constitution) are rarely referred to, much less relied upon, by other jurisdictions. For instance, out of the six opinions cited by the Court of Appeals of Maryland involving irrational legislative classifications based on occupation, only once has an opinion been relied upon by another jurisdiction.[7] The six cited cases have been *mentioned* by other jurisdictions only five times over a span of 70 years,[8] and have never been referred to by

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7. *Havre de Grace v. Johnson*, 143 Md. 601, 123 A. 65 (1923), was relied on by the United States District Court for the Western District of Missouri in 1927 in *Campbell Banking Co. v. City of Harrisonville, Mo.*, 19 F.2d 159, 160 (W.D. Mo. 1927).

8. *Wheeler v. State*, 281 Md. 593, 606, 380 A.2d 1052, 1060 (1977) was (Cont'd)

another state court. Accordingly, Petitioner's doomsday approach to petitioning this Honorable Court is unfounded and greatly exaggerated.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests this Honorable Court to reject Petitioner's petition for writ of certiorari.

Respectfully submitted,

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(Cont'd)
mentioned in *Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389,1405 (8th Cir. 1985), and expressly not followed in *Northside Sanitary Landfill v. Indianapolis*, 902 F.2d 521 (7th Cir. 1990). *Maryland State Bd. of Barber Examiners v. Kuhn*, 270 Md. 496, 312 A.2d 216 (1973) was referred to in *Martineau v. Ghezzi*, 389 F. Supp. 187 (N.D.N.Y 1974). *Bruce v. Director, Chesapeake Bay Aff.*, 261 Md. 585, 600, 27 A.2d 200, 208 (1971) was distinguished in *Bigelow v. Michigan Dept. of Natural Resources*, 727 F. Supp. 346 (W.D. Mich. 1989).